

JUDGMENT SHEET
IN THE LAHORE HIGH COURT,
RAWALPINDI BENCH, RAWALPINDI
JUDICIAL DEPARTMENT

Murder Reference No.26 of 2010

Criminal Appeal No.183 of 2010
(Shoaib Habib Versus The State)

Criminal Appeal No.188 of 2010
(Saqlain Abbas Versus The State)

Criminal Appeal No.181 of 2010
(Asif Ali Versus The State)

Criminal Appeal No.174 of 2010
(Zahid Mehmood Versus The State)

Criminal Appeal No.84-J of 2010
(Kashif Ali Versus The State)

J U D G M E N T

Date of Hearing.	08.05.2014
APPELLANTS BY	Raja Ghaneem Aabir Khan & Sardar Abdul Raziq Khan, Advocates.
COMPLAINANT BY	Raja Muhammad Farooq, Advocate.
STATE BY	Ch. Qaiser Mushtaq, A.D.P.P.

Syed Shahbaz Ali Rizvi, J:- This judgment will dispose of above captioned Murder Reference as well as connected Crl. App. No.183 of 2010 filed by Shoaib Habib, Crl. App. No.188 of 2010 filed by Saqlain Abbas, Crl. App. No.181 of 2010 filed by Asif Ali, Crl. App No.174 of 2010 filed by Zahid Mehmood & Crl.

App. No.84-J of 2010 filed by Kashif Ali, who were convicted by learned Addl. Sessions Judge, Rawalpindi in a case FIR No.25 dated 16.01.2007 u/ss 302/324/396/400/412/34 PPC, P.S Westridge, Distt. Rawalpindi, vide impugned judgment dated 12.03.2010 and sentenced infra: -

Appellants Shoaib Habib & Saqlain Abbas:

- i. **Death** under section **302(b)** PPC each as Ta'azir for committing murder of Tariq deceased with compensation to the tune of Rs.100,000/- u/s 544-A, Cr.P.C to be paid to the legal heirs of the deceased. They were also ordered to be hanged by neck till death.
- ii. **Ten years RI each** under section **324** PPC with a fine of Rs.10,000/- each, in default whereof to further undergo SI two months.

Appellants Asif Ali, Kashif Ali & Zahid Mehmood:

- i. **Life Imprisonment** under section **302(b)** PPC as Ta'azir for committing murder of Tariq deceased with compensation to the tune of Rs.100,000/- u/s 544-A, Cr.P.C to be paid to the legal heirs of the deceased.
- ii. **Ten years RI each** under section **324** PPC with a fine of Rs.10,000/- each, in default whereof to further undergo SI two months.

2. The rueful facts in brief, as disclosed by Zohaib Gondal complainant (PW-1) in his complaint (Ex.PA) as well as FIR (Ex.PN) are that on 15.01.2007 at about 9:45 p.m. he was present in his house along with his parents and brothers when the door bell rang, upon which he opened the

gate and saw that three/four young boys were standing there. They made straight firing at the complainant who received firearm injuries on different parts of his body. Upon the reports of firing, Tariq Mehmood (deceased) and Mst. Zakiya Gondal real father and mother of the complainant were attracted. The accused also made firing at father of the complainant, both of them got seriously injured and were shifted to hospital by his mother and brothers with the help of other people but father of the complainant succumbed to the injuries.

3. On this complaint, formal FIR (Ex.PN) was registered. The case was investigated and on completion of investigation, the appellants were sent to court to face trial.

4. Learned trial court after observing all the pre-trial codal formalities, indicted the appellants to which they pleaded not guilty and claimed to be tried. The prosecution was asked to lead its evidence, which produced as many as 15 PWs to prove its case.

Dr. Manzoor Ahmad Sahi, DMLO, DHQ Hospital, Rawalpindi (PW-7) conducted post mortem examination on the dead body of Tariq Mehmood (deceased) on 16.01.2007 and observed the following injuries on his body:-

- i. A lacerated wound of entry 1 x 1 cm, skin deep, interior aspect of left shoulder.*
- ii. A lacerated wound of entry 1.5 x 1 cm on left axilla.*
- iii. Entry wound 1 x 1 cm on outer aspect upper part of right leg 4 cm below the right knee joint.*
- iv. An exit wound 1.5 x 1 cm left side on back of chest 3 cm from midline on left side.*

REMARKS

The medical officer was of the opinion that deceased died due to injuries No.1, 2 and 4 collectively which damaged the vital organs i.e. left lung, which led to severe bleeding, hypovolaemic shock and ultimately death. Such injuries were sufficient to cause death in ordinary course of nature. All the injuries were ante-mortem in nature and were caused by firearm.

The probable time, elapsed between injury and death was within 2 ½ hours and between death and post mortem was one hour. Ex.PF was the correct carbon copy of post mortem report.

Earlier on 15.01.2007 he also conducted medico legal examination on the body of Zohaib Gondal and found the following injuries on his person: -

- i. A lacerated wound 1.5 x 1.5 cm on the posterior axillary fold.*
- ii. A lacerated wound 1.5 x 1.5 cm on left side front of chest, near the left nipple.*

- iii. A lacerated wound 0.75 x 0.75 cm on right side front of chest.*
- iv. A lacerated wound 2 x 0.5 cm on right anterior axillary fold.*
- v. A lacerated wound 2 x 1 cm through and through on right hand.*
- vi. A lacerated wound 7 x 1 cm on left middle finger. Through and through.*
- vii. A lacerated wound 0.5 x 0.5 cm on right deltoid area anteriorly.*
- viii. A lacerated wound 0.5 x 0.5 cm on rt. deltoid area posteriorly.,*
- ix. A lacerated wound 1 x 1 cm on supra pubic area.*
- x. A lacerated wound 1.5 cm 0.5 cm on left thigh, posteriorly.*

According to the doctor, all the injuries were fresh and were caused by firearm. He produced Ex.PE as medico legal report.

5. The prosecution gave up PWs namely Sardar Alam, Zain Tariq, Tasawar Hussain alias Mitho, Bashir Ahmad/HC, Muhammad Islam constable and Zafar Iqbal Butt SI and by tendering into evidence reports of Chemical Examiner Ex.PY, Serologist Ex.PY/1 and Forensic Science Laboratory Ex.PZ, closed the prosecution evidence.

6. Thereafter, statements of the appellants were recorded u/s 342 Cr.P.C. wherein they negated the allegations and professed their innocence. In reply to the question as to why the case against them and why the PWs deposed against them, all the appellants narrated on the same lines as under: -

“I have been falsely involved in this case. In fact, I was made a scapegoat. The witnesses are closely related to the deceased. No PW has deposed against me.”

The appellants did not opt to appear as their own witness to make statement on oath in disproof of allegations leveled against them, u/s 340(2) Cr.P.C, however opted to lead evidence in their defence and relied upon Ex.DA, produced by Asif appellant.

7. After conclusion of trial the appellants were convicted and sentenced as mentioned above, by the learned trial Court; hence the instant appeal.

8. Learned counsel for the appellants contends that none of the appellants was nominated in the FIR; that it is night time occurrence, no source of light has been given by the prosecution, during the investigation and even before the learned trial court; that the appellants were implicated in this case through a supplementary statement and the credibility of the supplementary statement is doubtful; that FIR is silent about the features of the accused persons and stolen property, no role is attributed to any of

the appellants; that in the supplementary statement, the complainant has not stated any source of identification of the accused persons. Further contends that the identification parade proceedings are doubtful; three witnesses joined the identification parade proceedings, Tayyab Tariq was given up during the trial by the prosecution; Zakiya Tariq could not identify two of the appellants namely Saqlain and Shoaib Habib, who had been awarded death penalty by the learned trial court while the third witness who joined the identification parade proceedings namely Zubair Tariq did not appear before the learned trial court; while according to the report of identification parade Ex.PO, Zohaib who is the complainant of this case, did not join the proceedings, though he stated before the learned trial court that he joined the same proceedings on 25.1.2007 and the date is discrepant with the date, mentioned in the proceedings; that the reason for conviction of Shoaib Habib appellant is that the pistol, recovered from him, was matched with the empty, taken from the place of occurrence, though Shoaib Habib appellant has not been attributed to have made any fire upon the deceased, while the appellant Saqlain stands convicted and sentenced to death because of the allegation of his successive fires on the person of the deceased and that the learned trial court has not applied its judicious mind while

convicting the appellants, therefore, the impugned judgment is not sustainable in the eye of law and prayed for acquittal of the appellants by setting aside the impugned judgment.

9. Conversely, learned D.P.G for the State assisted by learned counsel for the complainant has defended the impugned judgment by arguing that the occurrence took place in the house of the complainant party; that they have no previous ill-will to falsely implicate the appellants in the case; that the medical evidence corroborates the ocular account; that the recoveries effected from the appellants, are sufficient to provide corroboration to the other prosecution witnesses against the appellants; that the appellants were duly identified through identification parade and the impugned judgment passed by the learned trial court does not suffer from any illegality, infirmity or perversity; hence interference by this court is not warranted under the law and the crime, committed by the appellants is heinous in nature, rather has become menace to the society, therefore, no lenient view is required or justified regarding such criminals.

10. Having heard the learned counsel for the appellant, learned A.D.P.P for the state assisted by learned counsel for the complainant and gone through the record minutely, we have observed that it is a case about a night time occurrence of

inflicting firearm injuries to the complainant and his father, reported against 3, 4 young unknown persons without disclosing source of light, features of the accused or attribution of any specific role to any of the accused person and even snatching of any thing is not alleged.

The ocular account of the occurrence is given by complainant Zohaib Gondal PW.1 and Zakiya Tariq PW.2. Initially the FIR was recorded against 3, 4 unknown persons but later on the complainant through an addendum statement recorded on 20.04.2007 as stated by PW.15 Muhammad Asghar SI/I.O of the case about ninety five days after the occurrence and thirty five days subsequent to identification parade of the appellants, nominated five accused persons. The complainant has not disclosed any source of his information regarding the nomination of the appellant for commission of the alleged offence. Even during the identification test as is evident from the identification test report Ex.PO no role was attributed to the appellant by any of the eye witnesses which is definitely sufficient to create doubt regarding the veracity of the identification of the appellants by the PWs. In this regard reliance is placed on the judgments passed by the Hon'ble Supreme Court of Pakistan in case titled “Siraj ul Haq and another v The State” reported as 2008 SCMR 302 and case titled “Muhammad

Fayyaz v. The State” reported as 2012 SCMR 522 wherein the apex Court has pleased to hold that *“after his arrest the appellant was put to test identification parade and although he had been correctly picked up by the witnesses, yet indisputably said identification had been made without any reference to the role allegedly played by the appellant during the incident in issue. The law is by now settled that evidentiary value of such an identification in a test identification parade is next to nothing”*. Moreover, the identification parade has been conducted after about 51 days of the arrest of the appellants and in such a situation, possibility of the witnesses having seen the appellants by all the witnesses prior to the identification parade conducted by the special judicial Magistrate (PW.12) cannot be ruled out as is also evident from the serious objections raised by the appellants prior to the test identification parade. In this regard, reference is made to the judgment passed by the Hon’ble apex Court of the country in case titled “Nazeer Ahmad v. Muhammad Iqbal and another” reported as 2011 SCMR 527 wherein it is held as under: -

“....identification parade having been conducted after twenty four days of the arrest of the accused, possibility of the witnesses having seen them could not be excluded”....

Even otherwise, according to the report of identification parade Ex.PO, three witnesses namely Tayyab Tariq, Zakiya Tariq

and Zubair Tariq joined the proceedings of identification test and the complainant Zohaib Gondal did not join the same, as is evident from the supra report. During the trial, Tayyab Tariq was given up by the prosecution while Zubair Tariq also did not appear and the prosecution is silent about him according to the record. Zakiya Tariq PW.2, the only witness who joined the said proceedings, appeared before the learned trial court but the fact remains that during the said test, she could not identify Shoaib Habib and Saqlain, the appellant, besides not assigning any role to any of the appellant. Even during her statement before the learned trial court, she remained unable to attribute any role to any of the appellants, a relevant part of her examination in chief is reproduced as under:

“I saw that Zohaib and Tariq was injured condition. All the accused present in the Court caused fire arms injuries hitting them at different parts of their person.....During the occurrence one of the accused snatched wrist watch as well as purse from the possession of Tariq deceased”.

She further admitted during her cross examination as under:-

“I did not describe the role to the accused during the identification parade”.

Zohaib Gondal, complainant, though claims that he identified the appellants during test of identification parade but the

report Ex.PO reflects otherwise. Learned counsel for the complainant during his arguments, maintained that in fact Zohaib Gondal had joined the identification parade and not Zubair Tariq and name of Zubair Tariq had inadvertently been mentioned in the said report. But this contention forwarded by learned counsel for the complainant does not find support from the record as is evident from the statement of Zubair Tariq son of Tariq Mehmood, available at page 8 of the report of said proceedings (Ex.PO) wherein it is recorded as under: -

Zubair Tariq clearly stated in his statement that his brother and father were injured; hence it can indisputably be said that the complainant who himself is the only injured of this case besides the deceased, never joined the identification parade proceedings. Although, PW.1 the complainant and Zakiya Tariq PW.2 have identified the appellants during their statements before the learned trial court, yet the fact remains that they had many previous

opportunities to see the appellants while appearing before the learned trial court at different prior stages of the trial.

Moreover, the complainant claims that identification parade was conducted at Adyala Jail, Rawalpindi on 25.1.2007 while PW.2 Zakiya Tariq states discrepantly as she narrated the date as 15.1.2007 during her examination in chief but during cross examination she stated another self-discrepant date i.e. 15.3.2007 while identification parade proceedings Ex.PO reflects the date as 15.3.2007, which is also proved by PW.12, special judicial Magistrate. All these aspects of the case show that the prosecution evidence itself is contradictory, creating doubts in its own case.

No source of light has been given by the PWs in their statements recorded before the police and even before the learned trial court, while admittedly it is a night time occurrence. There is no dispute about the fact that the complainant or his mother did not narrate any features of the appellants in their statements before the police on the day of occurrence. Though the complainant is the injured witness of the occurrence, yet his being injured is not sufficient to believe his testimony, mechanically as it has been repeatedly held by the Hon'ble Courts that the injuries are not the proof of his credibility and truth. Reliance is placed on the

judgment passed by the Hon'ble Supreme Court of Pakistan in case titled *“Nazeer Ahmad v. Iqbal and another”* reported as *2011 SCMR 527* wherein it is held *“it is settled law that injuries of PW are only indication of his presence at the spot but are not affirmative proof of his credibility and truth”*. It seems that both the witnesses have deposed against the appellants on the basis of information provided to them by the police which is not believable in the circumstances of the case, so outcome of all the discussion is that the testimony of both the witnesses narrating the ocular account of the occurrence is not confidence inspiring and trust worthy regarding the culpability of the appellants.

11. As far as the evidence of recovery from the appellants is concerned, though after disbelieving the ocular account, coupled with the identification parade, this piece of evidence is not of much importance but we feel it appropriate to make reappraisal of the same as well. According to the prosecution case, the appellants were arrested on 26.1.2007 by Mazhar Hussain SI PW.14 of P.S Pir Wadhai, Rawalpindi and on the same day pistols 30 bore P.10, P.11, P.12 and P.13 were recovered from the possession of Shoaib Habib, Saqlain Abbas, Kashif and Zahid appellants respectively. While pistol P.15 was recovered from the appellant Asif on 24.1.2007 by Muhammad Mumtaz ASI/I.O of case

FIR No.24 dated 24.1.07 u/s 337-H(ii) PPC & section 13 of Arms Ordinance, registered at P.S City, Rawalpindi, which was subsequently handed over to Muhammad Asghar SI PW.15, I.O of this case on 16.4.07 & 20.4.2007 by Bashir Ahmad HC, Moharrar P.S Pir Wadhai, Rawalpindi and PW.10 Sikandar Hayat ASI/Moharrar, Malkhana of P.S City, Rawalpindi respectively. According to the I.O Asghar SI/PW.15 he took the pistol, crime weapon, into his possession from the above mentioned police station vide memo Ex.PG, Ex.PH, Ex.PJ, Ex.PK and Ex.PM on 16.4.2007 and 20.04.2007 respectively when admittedly all these pistols were not sealed in the parcels and not having any number or specific marks of identification as is evident from the supra mentioned recovery memos. It is important to mention here that according to the statements, given by all the appellants before the learned judicial Magistrate PW.12, during identification parade on 15.3.2007, they were arrested by the police on 19.1.2007 and were kept detained at different Police Stations i.e. P.S City, P.S Pir Wadhai and P.S Loco Shed, Rawalpindi while according to the prosecution's case, crime empties were sent to the office of Forensic Science Laboratory on 23.1.2007 which were received by the said office on 24.1.2007. Though, the prosecution witnesses denied the arrest of the appellants on 19.1.2007 but the

stance of the appellants finds strength from the perusal of Ex.DA, which is an application u/s 491 Cr.P.C moved to the court of learned Sessions Judge, Rawalpindi by Nasreen Bano w/o Saif Ali, resident of Mehar Abad, Nai Abadi, Rawalpindi Cantt for the recovery of her son Asif Ali, the appellant from the illegal custody of police of P.S Pir Wadhui and the orders dated 24.1.2007, 26.1.2007 and 01.02.2007, passed by learned Sessions Judge, reflect that the said appellant was kept in illegal custody by the police. Keeping in view the surrounding circumstances of the case and the unfortunate practice of the police in our country, we are of the view that all the appellants were kept in illegal custody without effecting their arrest prior to 22.1.2007 and 26.1.2007 to create incriminating evidence against them and to strengthen the prosecution case by manipulating the crime empties. Similarly, the recovery of wrist watch P.1 alleged against the appellant Asif is also not trust worthy because firstly there is nothing mentioned in the FIR regarding snatching of any wrist watch by the culprits and secondly, the watch P.1 was taken into possession when it was produced by some unknown relative of the said appellant, who was not even associated in the investigation. In this view of the matter, we do not find this piece of evidence trustworthy and sufficient to record conviction against the appellants. The law, by now, is

settled that it is the prosecution who is to prove its case beyond any shadow of reasonable doubt against an accused person and it is also settled now that multiple doubts in the prosecution case are not required to record judgment of acquittal but a single reasonable doubt is sufficient to extend benefit of the same to the accused as a matter of right. In this regard, reliance is placed on the judgment passed in case titled “Mst. Shamshad v. The State” reported as 1998 SCMR 854, case titled “Waqar Ahmed v. Shaukat Ali and others” reported as 2006 SCMR 1139, case titled “Akhtar Ali and others v. The State” reported as 2008 SCMR 6 & case titled “Sher Bahadur and another v. The State” reported as 1972 SCMR 651.

In this case, we have come to an irresistible and unavoidable conclusion that the prosecution has miserably failed to prove its case beyond any shadow of doubt against all the appellants while conviction can not be recorded on the basis of mere conjectures, surmises and the morality only. Strong evidence of an unimpeachable character is required to convict the accused but unfortunately this case lacks the same. Hence, extending benefit of doubt to the appellants, all the Appeals Nos.183 of 2010, 188 of 2010, 181 of 2010, 174 of 2010 and 84-J of 2010, filed by the appellants are hereby allowed, conviction and sentences recorded by the learned trial court are set aside and the

appellants are acquitted of the charge u/s 302(b) and 324 PPC. The appellants Shoaib Habib and Saqlain Abbas are in jail; shall be released forthwith, if not required in any other case. The remaining appellants are on bail; their sureties stood discharged from their liability. The **Murder Reference No.26 of 2010** is answered in the **NEGATIVE** and the death sentence awarded in this case is **NOT CONFIRMED.**

(Muhammad Tariq Abbasi)
Judge

(Syed Shahbaz Ali Rizvi)
Judge

Approved for reporting.

Judge

Judge

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Rafiqat Ali