

IN THE SUPREME COURT OF PAKISTAN  
( Appellate Jurisdiction )

Present:

Justice Jamal Khan Mandokhail  
Justice Syed Hasan Azhar Rizvi  
Justice Naeem Akhtar Afghan

**JAIL PETITION NO.234 OF 2017 AND  
CRIMINAL PETITION NO.596-L OF 2017**

(On appeal against the judgment dated 08.03.2017 passed by the Lahore High Court, Lahore in CrI. Appeal No.84-J/2016 and M.R. No.389/2012)

Rafaqat Ali @ Foji	(JP.234/17)			
Muhammad Anwar	(CrI.P.596-L/17)	...	...	Petitioner(s)

**Versus**

The State and others	(in both cases)	...	...	Respondents
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For the petitioner

(JP.234/17)	:	Sardar Akbar Ali Dogar, ASC
(CrI.P.596-L/17)	:	Mian Pervaz Hussain, ASC
For the State	:	Mr. Irfan Zia, Addl. PG. Pb.
Date of hearing	:	23.05.2024

JUDGMENT

**Naeem Akhtar Afghan, J.** On the charge of committing murder of Muhammad Akram (**the deceased**) by firing, *vide* judgment dated 28 May 2012, the learned Additional Sessions Judge Sheikhpura (**the Trial Court**) convicted the petitioner Rafaqat Ali alias Foji (**the convict**) u/s 302 (b) of the Pakistan Penal Code (**PPC**) as *Tazir* and awarded him sentence of death with compensation of Rs.200,000/- (two hundred thousand only) to be paid u/s 544-A of the Code of Criminal Procedure (**Cr.P.C**) to the legal heirs of the deceased in FIR No.393/2005 Police Station (**PS**) City Safadarabad, District Sheikhpura (now District Nankana Sahib) lodged by Muhammad Anwar (**the complainant**).

2. While maintaining the conviction of the convict u/s 302 (b) PPC, his sentence has been reduced to imprisonment for life, the amount of

compensation and punishment in default thereof has been maintained with benefit of section 382-B Cr.P.C., while the Murder Reference No.389/2012 has been answered in negative by the Division Bench of Lahore High Court **(the Appellate Court)** *vide* judgment dated 8 March 2017 against which the convict has filed Jail Petition No.234/2017 and the complainant has filed Criminal Petition for leave to Appeal No.596-L/2017 for enhancement of the sentence of the convict.

3. After hearing learned counsel for the convict, learned counsel for the complainant and learned Additional Prosecutor General, we have perused the available record. As per version of FIR it is the case of the prosecution that on 9 December 2005 at about 5:30 pm the complainant (PW-2) alongwith his brother Muhammad Akram (the deceased), and his two sons Fayyaz (not produced at the trial) and Muhammad Nawaz (PW-3) were returning to their home from their *Haveli* with fodder for their cattle. In the meanwhile when they were near a turn a few paces away from *Haveli*, the convict armed with 12 bore rifle alongwith his son Muhammad Nafees **(absconding accused)** armed with 30 bore pistol appeared. Muhammad Nafees made *lalkara* for not sparing Muhammad Akram alive upon which the convict made a straight fire upon Muhammad Akram with his rifle due to which Muhammad Akram received injuries on his left arm, front of chest and thumb of right hand. After getting injured, Muhammad Akram fell on the ground while the convict and his son fled towards School with their arms. The injured Muhammad Akram was taken to Safadarabad Hospital by the complainant and his sons but the injured had succumbed to the injuries. Previous enmity was mentioned as motive of the occurrence. The complainant further stated that accused Abdul Majeed and Muhammad Saleem were the abettors.

4. According to statement of Muhammad Nawaz (PW-3), blood stained earth from underneath the cot of the deceased in Rural Health Centre Safdarabad was taken into possession by the Investigating Officer. Admittedly no blood stained earth was collected from the alleged place of occurrence during investigation and in this regard no explanation has been offered by any prosecution witness including the Investigating Officer.

The above has created serious doubt about the place of the occurrence as narrated by the prosecution witnesses.

5. No crime empty or pellets were recovered from the place of occurrence. In this regard PW-2 has furnished contradictory explanation in his cross-examination by stating that one crime empty was collected from the spot and that the empty cartridge was taken away by the convict in his gun.

6. The report of the firearm expert (Ex:PZ) confirming that 12 bore rifle (allegedly recovered on the disclosure and pointation of the convict on 18 August 2009 from his house) is in working condition, has already been held inconsequential by the Appellate Court and as such, same cannot be considered as incriminating/corroborative piece of evidence against the convict.

7. PW-2 is real brother of the deceased and PW-3 is nephew of the deceased. The motive of the occurrence has been alleged by PW-2 as previous enmity and in this regard two FIRs have been brought on record which were got registered by the real brother and paternal uncle of the convict against the deceased. PW-2 and PW-3 claim to accompany the deceased at the time of occurrence but surprisingly they did not receive any firearm injury. It is not believable that by killing a person in presence of his close relatives accused would not attempt to cause any injury to the prosecution witnesses leaving for them evidence to be hanged. PW-2 and PW-3 have also made dishonest improvements in their statements at the trial. The ocular testimony of PW-2 and PW-3 is lacking corroboration in material aspects.

In view of all the above, false implication of the convict by PW-2 and PW-3 due to previous enmity cannot be ruled out of consideration.

8. While awarding conviction and sentence to the convicts, both the Courts below have also considered the absconsion of about three years and eight months of the convict. In this regard both the Courts below have failed to appreciate that mere absconsion of an accused cannot be made a basis of conviction and that absconsion of an accused, being a relevant fact, can be used as a corroborative piece of evidence which cannot be read in isolation but it has to be read alongwith the substantive piece of

evidence. Reference in this regard is made to the case of '***Rohtas Khan v. the State***<sup>1</sup>.

Both the Courts below have also failed to appreciate that mere absconsion is not conclusive proof of guilt of an accused. It is only a suspicious circumstance which cannot take place of proof. The value of absconsion, therefore, depends on the fact of each case. Reference in this regard is made to the case of '***Haji Paio Khan v. Sher Biaz***<sup>2</sup>.

9. According to the settled principles of law abscondence can never remedy the defects in the prosecution case as it is not necessarily indicative of guilt. Moreover, abscondence is never sufficient by itself to prove the guilt. Reference in this regard is made to the case of '***Muhammad Khan v. the State***<sup>3</sup>.

In the case of '***Shafqat Abbas v. the State***<sup>4</sup> it has been held that in absence of any other incriminating piece of evidence mere absconsion does not entail penal consequences against accused or to expose him to the criminal liability.

10. In view of all the above infirmities in the case of the prosecution it is concluded that the prosecution has failed to prove the charge against the convict beyond reasonable doubt. It is further concluded that the conviction and sentence awarded to the convict by the Trial Court and maintained by the Appellate Court, with reduction of death sentence to imprisonment for life, is result of mis-appreciation of the evidence available on record.

11. For the above reasons drawn today, *vide* our short order dated 23 May 2024 (reproduced herein below), Jail Petition No.234/2017 was converted into appeal and while allowing the same, the convict has been acquitted of the charge while Criminal Petition No.596-L/2017 for enhancement of the sentence of the convict has been dismissed.

**"Jail Petition No.234/2017**

*For the reason to be recorded later, the petition is converted into an appeal and is allowed. The judgments dated 28.05.2012 and 08.03.2017 of the Trial Court and of the High Court*

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<sup>1</sup> 2010 SCMR 566

<sup>2</sup> 2009 SCMR 803

<sup>3</sup> 1999 SCMR 1220

<sup>4</sup> 2007 SCMR 162

*respectively are set aside. The appellant is acquitted of the charge. He be set at liberty forthwith if not required in any other case.*

**Crl. Petition No.596-L/2017**

*2. In view of the acquittal of the accused, this petition is dismissed."*

Judge

Judge

Judge

Islamabad:  
27.05.2024  
*(M. Saeed/Zohair Alzal, LC*

NOT APPROVED FOR REPORTING.