IN THE SUPREME COURT OF PAKISTAN
( Appellate Jurisdiction )

**PRESENT:**
Mr. Justice Gulzar Ahmed
Mr. Justice Sardar Tariq Masood
Mr. Justice Faisal Arab

**CRIMINAL APPEALS NO. 402 & 403 OF 2013**
(On appeal against the judgment dated 15.06.2009 passed by Lahore High Court, Lahore in Crl. A. No. 615 of 2003)

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| Sardar Bibi widow of Muhammad | **(In Crl. A. No. 402 of 2013)** | |
| Qamar Abbas & another | **(In Crl. A. No. 403 of 2013)** | **... Appellant (s)** |
| | Versus | |
| Munir Ahmed etc.. | **(In Crl. A. No. 402 of 2013)** | |
| The state | **(In Crl. A. No. 403 of 2013)** | **... Respondent (s)** |

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| For the appellant (s) **(In Crl. A. No. 402 of 2013)** | **:** | Mr. Ghulam Mustafa Kandwal, ASC<br>Syed Rifaqat Hussain Shah, AOR |
| **In Crl. A. No. 403 of 2013** | **:** | Mrs. Bushra Qamar, ASC<br>Mrs. Tasneem Ameen, AOR (Absent) |
| For the respondent (s) **(In Crl. A. No. 402 of 2013)** | **:** | Mrs. Bushra Qamar, ASC<br>Mrs. Tasneem Ameen, AOR (Absent) |
| For the state | **:** | Ch. Muhammad Waheed Khan, Addl. P.G. Pb. |
| Date of Hearing | **:** | 29.11.2016 |

## JUDGMENT

**SARDAR TARIQ MASOOD, J.** Qamar Abbas and Falak Sher (appellants in Criminal Appeal No. 403 of 2013) along with acquitted accused persons i.e. Munir Ahmed, Sikandar Hayat, Fateh Muhammad, Mulazim Hussain, Nasar Iqbal (Respondents No. 1 to 5 in Criminal Appeal No. 402 of 2013) along with Sultan Ahmad, Akram and Baati, allegedly committed murder of Zafar Iqbal and Sarwar within the area of village Rairka Bala within the jurisdiction of P.S. Miana Gondal, District Mandi Baha-ud-Din on 12.06.2001 at 2:00 a.m.. All the above mentioned accused persons were booked in case FIR No. 158 registered on the same day at the same police station. It is alleged in the FIR that after the occurrence the accused persons took away the chopped head of Zafar Iqbal to their *Daira* and had shown the same to their father Shana accused (since dead) and told him that they had taken the revenge of the murder of their brother whereupon Shana directed them to cause the said head disappear. The motive mentioned in the FIR was that Khizer Hayat, the maternal nephew of complainant, had murdered

Muhammad Ameer son of Shana accused, 4/5 years prior to the occurrence. After the conclusion of trial, both the appellants of Criminal Appeal No. 403 of 2013 along with respondents No. 1 to 5 were convicted under Section 148 P.P.C. and were sentenced to three years R.I. each along with fine of Rs. 20,000/- each or in default thereof to further undergo S.I. for six months. Falak Sher, Qamar Abbas, Munir Ahmed, Sikandar and Mulazam Hussain were also convicted under Section 302 (b) read with Section 149 P.P.C. and were sentenced to death on two counts as Tazir and to pay Rs. 100,000/- each on two counts as compensation under Section 544-A Cr.P.C. or in default thereof to further undergo S.I. for six months whereas Nasar Iqbal and Fateh Muhammad were convicted under Section 302 (c) read with Section 149 P.P.C. and were sentenced to ten years R.I. on two counts. They were also directed to pay compensation of Rs. 25,000/- each or in default thereof to further undergo six months S.I.. The conviction and sentence of Falak Sher and Qamar Abbas was upheld by the Division Bench of the Lahore High Court only for the murder of Zafar Iqbal deceased whereas the conviction and sentences of Munir Ahmed, Mulazam Hussain, Sikandar Hayat, Fateh Muhammad and Nasar Iqbal were set aside by the High Court. Hence the present appeals, by leave of this Court granted on 05.12.2013, to re-appraise the entire evidence and with the assistance of the learned counsel for the parties, we have undertaken that exercise and also perused the record. .

2. According to the prosecution, the occurrence took place at 2:00 a.m. in odd hours of the night. Although prosecution alleged that sufficient light of bulbs was available there but during investigation, no such bulbs (source of light) were taken into possession by the I.O.. In that eventuality, the identification of the assailants became doubtful especially when Mehmand complainant, PW-11 and Muhammad Yar PW-12 allegedly saw the occurrence from a distance of more than 100 feet. Learned counsel for the complainant and learned Additional Prosecutor General are unable to give any explanation as to why the source of light was not taken into possession. We have also observed that the residential house of complainant was at a distance of 3 acre from the place of occurrence whereas the residential house of Muhammad Yar PW-12 was at the distance of 1-1/2 mile from the place of occurrence. The

sons of the complainant were sleeping in front of the cattle shed. In that eventuality, the presence of Mehmand, complainant and Muhammad Yar, across the road, upon the roof top of his another *Haveli* is a sheer chance because at such odd hour of the night they were supposed to be present in their residences which is far away from the place of occurrence. According to Muhammad Yar, PW-12, normally at the time of occurrence he used to be at his residence which is 1-1/2 mile away from the place of occurrence. He did not put forward any reason for his presence at the place of occurrence except that he was sleeping on the roof of the cattle shed of complainant. Both the witnesses of the ocular account in their statements before the court claimed that they were sleeping on the roof top of the cattle shed of the complainant. The site plan (Exb-PL) totally negate this version as the cattle shed and the open place where both the deceased were sleeping, were on the northern side of the road whereas the complainant and Muhammad Yar were allegedly sleeping across the road on the roof top of the *Haveli* of complainant shown at point “E” of the site plan. The presence of the said witnesses at the roof top of the cattle shed is not shown in the site plan. So the presence of both the witnesses at the place of occurrence is doubtful. In the FIR, the complainant claimed that Qamar Abbas and Mulazam were armed with Tokas whereas rest of the accused, eight in numbers, were armed with firearm weapons. No specification of said firearm weapons were given in the FIR or in the statement under Section 161 Cr.P.C.. From the place of occurrence, only two crime empties of .12 bore have been recovered. Both the witnesses for the first time during trial specified the weapons and alleged that such and such specific weapon was in the hand of such and such accused. Both the witnesses had been duly confronted with their previous statements where such specification of weapons was not mentioned. As doctor, while conducting postmortem examination, declared that the deceased persons received bullet injuries hence for the first time during trial, Falak Sher and Sikandar were shown to be armed with .30 bore pistol and Munir being armed with 7mm rifle. This willful and dishonest improvement was made by both the witnesses in order to bring the prosecution case in line with the medical evidence. In the FIR the complainant alleged that fire shot of Falak Sher hit Zafar Iqbal deceased on

his chest and the fire shot of Sultan Ahmed accused also hit on the chest of deceased Zafar Iqbal. According to doctor, there was only one fire arm entry wound on the chest of the deceased Zafar Iqbal. In order to meet this situation, witnesses for the first time, during trial made omission and did not allege that the fire shot of Sultan hit at the chest of Zafar Iqbal, deceased. So the improvements and omissions were made by the witnesses in order to bring the case of prosecution in line with the medical evidence. Such dishonest and deliberate improvement and omission made them unreliable and they are not trustworthy witnesses. It is held in the case of **Amir Zaman Vs. Mahboob and others (1985 SCMR 685)** that testimony of witnesses containing material improvements are not believable and trustworthy. Likewise in **Akhtar Ali's case (2008 SCMR 6)** it was held that when a witness made improvement dishonestly to strengthen the prosecution's case then his credibility becomes doubtful on the well-known principle of criminal jurisprudence that improvement once found deliberate and dishonest, cast serious doubt on the veracity of such witness. In **Khalid Javed's case (2003 SCMR 149)** such witness who improved his version during the trial was found wholly unreliable. Further reference in this respect may be made to the cases of **Mohammad Shafique Ahmad Vs. The State (PLD 1981 SC 472), Syed Saeed Mohammad Shah and another Vs. The State (1993 SCMR 550)**, and **Mohammad Saleem Vs. Mohammad Azam (2011 SCMR 474)**.

According to prosecution, Falak Sher appellant and his co-accused Sultan Ahmed effectively fired at the chest of Zafar Iqbal deceased but the trial court had acquitted Sultan Ahmed vide judgment dated 09.04.2003 and the eye witnesses produced by the prosecution i.e. Mehmand complainant (PW-11) and Muhammad Yar (PW-12) were not believed to the extent of the said co-accused. The said acquittal has not been challenged by the complainant or state. Likewise it was the prosecution case that Qamar Abbas appellant along with his co-accused Mulazam chopped the neck of Zafar Iqbal with Tokas. It was also the case of the prosecution that the neck of the deceased Zafar Iqbal was still attached with the body of the deceased when Akram and Baati accused persons separated the same from the body by pulling it. The trial

court acquitted Akram and Baati accused whereas Mulazam Hussain had been acquitted by the High Court meaning thereby the eye witnesses had not been believed to the extent of said co-accused who actively participated in the process of chopping and detaching the head of Zafar Iqbal from his body. This court had already settled the law on the point that if the eye witnesses produced by the prosecution are disbelieved to the extent of some accused person attributed effective role, then the said eye witnesses cannot be relied upon for the purpose of convicting another accused person attributed a similar role, without availability of independent corroboration to the extent of such other person. Reference in this respect may be made to the cases of **Ghulam Sikandar Vs. Mamaraz Khan (PLD 1985 S.C. 11), Sarfraz alias Sappi Vs. The State (2000 SCMR 1758), Iftikhar Hussain and others Vs. The State (2004 SCMR 1185), Farman Ahmed Vs. Muhammad Inayat and others (2007 SCMR 1825), Akhtar Ali Vs. The State (PLJ 2008 SC 269), Irfan Ali Vs. The State (2015 SCMR 840)** and **Shahbaz Vs. The State (2016 SCMR 1763)** and **Akhtar Ali and Others Vs. The State (2008 SCMR 6)**

Although, the High Court considered the recovery of pistol from Falak Sher as corroboratory piece of evidence but we observe that in the FIR no specific weapon was shown in the hands of the appellant Falak Sher. Even no crime empty of .30 bore was recovered from the place of occurrence and there is no positive report of FSL regarding matching of any crime empty with the allegedly recovered pistol from Falak Sher. So the said recovery is inconsequential and cannot be considered as the corroborative piece of evidence. So far recovery of Toka from Qamar Abbas appellant is concerned, we observe that such recovery was effective after about one month of occurrence and Talib Hussain PW-4 admitted that the place of recovery was collectively inhabited by all the accused so the place of recovery is a joint house and was not in the exclusive possession of Qamar Abbas appellant. Allegedly, the recovery was effected after about one month of the occurrence and it is not expected from an accused person to keep such weapon (stained with blood) as souvenir because during the said period there was ample time to destroy or at least washout the said weapon. The Toka was recovered from

behind the door of a house which according to PW was collectively inhabited by many persons. In these circumstances, it could not be said that the recovery was made from the exclusive knowledge and possession of the accused. So no reliance can be placed to such recovery and the High Court had wrongly considered such doubtful recoveries as corroborative piece of evidence to the unreliable ocular account. In the absence of any independent corroboration, the appellants, Falak Sher and Qamar Abbas deserve the acquittal, in view of the case law referred above.

3. Although in the FIR, complainant alleged specific motive regarding the murder of son of Shana accused by maternal nephew of complainant but during cross examination complainant admitted that besides Khizar Hayat, Nawaz and Ejaz were also involved in the said murder case and all the said accused had been acquitted due to a compromise arrived at between the parties. He also admitted that neither he nor his deceased sons were involved in any manner in the said murder case. In that eventuality, there was hardly any occasion for the appellants to commit the murder of deceased person. The complainant during cross examination tried to meet this situation and claimed that he was blamed by the accused person about the said murder. This explanation and improvement is not helpful to the prosecution as in that situation the complainant should be the first target, if present at the spot. From the above discussion, it is quite clear that appellants and their co-accused had no motive or reason to commit murder of the deceased persons and the asserted motive has not been proved. Although occurrence took place at 2:00 a.m. and police station was at a distance of 9 kilometer but report had been lodged not at the police station rather at the spot at about 6:00 a.m. which gave inference that FIR had been lodged after deliberation and consultation. The complainant also admitted during cross-examination that police recorded his statement after the spot inspection. He further deposed that police remained at the spot till 9:30 a.m. and after their departure, he went to police station and told the name of accused again in the police station and his thumb impression was obtained on his statement in the police station, whereas according to prosecution the complaint/fard bayan

was prepared at the spot. Subsequent statement of complainant in the police station after 9:30 a.m. further confirms the deliberation and consultation on the part of complainant and the police. According to prosecution, the matter was reported at 6:00 a.m. but postmortem examination on the dead body was conducted at 1:00 p.m. i.e. after 7 hours of the lodging of FIR. This delay raised suspicion regarding the registration of the FIR at the given time. The investigation officer, who initially investigated this case was Tariq Mehmood Ghani, but he was not produced by the prosecution as prosecution had claimed that the said witnesses had gone abroad. Although, secondary evidence has been produced to the extent of said I.O. but prosecution did not establish, by producing the constable, who made report that the said witness had gone abroad. Due to said reason, defence was deprived of valuable right to cross-examine the said I.O. through whom all the facts and circumstances favoring the accused could have been brought on the record.

4. From the above discussion, it is quite clear that in this case FIR was chalked out after consultation and deliberation. The delay in the FIR and postmortem examination further confirms that FIR and documents i.e. inquest report etc. were prepared much after the given time. The source of light i.e. bulbs etc. was not taken into possession during investigation to establish that the witnesses who were allegedly at the distance of more than 100 feet could identify the assailants. So the identification of the assailants was also doubtful in such circumstances of the case. The witnesses of the ocular account are closely related to the deceased and were chance witnesses as their places of residence were far away from the spot. They could not establish their presence at the place of occurrence. Besides that these two witnesses made dishonest and willful improvements and omission in order to strengthen the prosecution case and bring their case in line with the medical evidence. In that eventuality, no reliance can be placed on their testimony as they were not truthful witnesses. The motive in this case remained unproved as neither the deceased nor the complainant were involved in any manner in the murder case of the son of accused Shana and there is no occasion for the accused party to launch attack upon the deceased person. The recovery of pistol from Falak Sher

without any positive report of FSL is inconsequential, as discussed above, and the recovery of *Toka* from Qamar Abbas from a house inhabited by many persons is also not legally helpful to the prosecution. The prosecution had involved the whole family of Shana accused and other relatives and due to the said reason, certain accused persons had been acquitted by the trial court whereas respondents No. 1 to 5 of Criminal Appeal No. 402 of 2013 have been acquitted by the High Court. In that eventuality, independent strong corroboration was required to uphold the conviction and sentence of the appellants in Criminal Appeal No. 403 of 2013 but we have failed to find out any independent corroboration to the ocular account furnished by the above mentioned eye witnesses and the fate of the present appellants i.e. Qamar Abbas and Falak Sher cannot be any different from that of their acquitted co-accused. Consequently, Criminal Appeal No. 402 of 2013 against the acquittal of respondents No. 1 to 5 is dismissed and sureties along with P.R. bonds deposited with the Additional Registrar (Judicial) of this Court are hereby discharged. Criminal Appeal No. 403 of 2015, filed by Qamar Abbas and Falak Sher appellants is, therefore, allowed. Their conviction and sentence, recorded and upheld by the courts below, are set aside and they are acquitted of the charge by extending the benefit of doubt to them. They shall be released from jail forthwith if not required to be detained in connection with any other case.

**Judge**

**Judge**

**Judge**

**Islamabad, the**
29th November, 2016
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***APPROVED FOR REPORTING***

Announced in the open Court on _____ at Islamabad.

**Judge**