

**IN THE SUPREME COURT OF PAKISTAN**

(Appellate Jurisdiction)

**PRESENT:**

MR. JUSTICE MANZOOR AHMAD MALIK  
MR. JUSTICE YAHYA AFRIDI

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**CRIMINAL APPEAL NO. 582 OF 2018**

(On appeal against the judgment dated 12.05.2015 passed by the Lahore High Court, Lahore in Criminal Appeal No. 1597 of 2006 and Criminal Revision No. 289 of 2007)

**Muhammad Rafique alias Feeqa**

...Appellant

*versus*

**The State**

...Respondent

For the Appellant:

Ch. Nazir Ahmed Kamboh, ASC.  
Mian Ghulam Hussain, AOR (Absent)

For the State:

Ch. M. Sarwar Sidhu, Addl. P.G. Punjab

For the Complainant:

Mian Muhammad Ismail Thaheem, ASC.  
Syed Rifaqat Hussain Shah, AOR.

Date of Hearing:

03.04.2019

**JUDGMENT**

**YAHYA AFRIDI, J.** — Muhammad Rafique alias

Feeqa, the present appellant, has been granted leave of this Court *vide* order dated 02.11.2018 to consider the decision dated 12.05.2015 passed by the Lahore High Court, Lahore in Criminal Appeal No. 1597 of 2006 and Criminal Revision No. 289 of 2007, in terms that:

*"It has inter alia been contended by the learned counsel for the petitioner that the place of occurrence was the Haveli of the petitioner and according to the FIR, the complainant party had gone to that Haveli in order to lodge a protest against the accused party in respect of an alleged cutting of a joint watercourse. It has been argued by the learned counsel for the petitioner that no proof regarding any watercourse having been cut by the petitioner or anybody else belonging to the accused party had been produced before the trial court and in the absence of such proof the purpose of the complainant party going to the Haveli of*

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the petitioner after darkness had set in was quite suspicious. He has also pointed out that an FIR in respect of the incident in issue had been lodged at the spot giving rise to an inference that the same had been lodged and registered after deliberations and preliminary investigation. He has also highlighted that post-mortem examination of the dead body had been conducted after 21 and a half hours of the occurrence during the next-afternoon once again giving rise to an inference that time had been consumed by the complainant party and the local police in cooking up a story for the prosecution and in procuring and planting eyewitnesses. In the Post-mortem Examination Report time of death of the deceased had been recorded at 05.30 P.M on the same day in the inquest Report it had been recorded that at the time of inspection of the dead body the mouth of the deceased was open which also indicated that the closely related eyewitnesses produced by the prosecution were in fact not available with the deceased at the time of his death. It has also been argued by the learned counsel for the petitioner that all the eyewitnesses produced by the prosecution were related and chance witnesses and the stated reason for the availability of the said eyewitnesses at the spot at the relevant time had not been established through any independent evidence. He has also highlighted that through any independent evidence. He has also highlighted that there was no previous enmity between the parties and the immediate cause regarding the cutting of the watercourse had not been established in this case. The learned counsel for the petitioner has also submitted that the alleged recovery of a gun from the petitioner's possession during the investigation was legally inconsequential because the report of the Forensic Science Laboratory in that regard was received in the negative and the crime-empty secured from the place of occurrence had not matched with the recovered gun. With these submissions, it has been maintained by the learned counsel for the petitioner that the prosecution had failed to prove its case against the petitioner beyond reasonable doubt and the courts below were not justified in recording and upholding the petitioner's conviction and sentence on the charge of murder.

*The contentions of the learned counsel for the petitioner noted above call for re-a appraisal of the evidence so as to secure the interests of justice. This petition is, therefore, allowed and leave to appeal is granted for the purpose."*

2. The unfortunate incident, which led to the tragic death of Muhammad Azam, was recorded on the complaint of Bashir Ahmad (PW-7) as case FIR No. 62 dated 27.02.2002, registered at Police Station Manga Mandi, District Lahore, wherein the present appellant, Muhammad Rafique alias Feeqa, along with his brother Mushtaq Ahmad were accused for the commission of the offence under Section 302, read with Section 34 of the Pakistan Penal Code, 1860 (PPC).





3. The motive attributed by the complainant for the crime was that Muhammad Rafique *alias* Feeqa and his brother Mushtaq Ahmad had disturbed the joint *khall* for irrigating their agricultural land.

4. The matrix of the prosecution's case is based on Bashir Ahmad's initial report, wherein he stated that on being informed about the joint *khall* being disturbed by Muhammad Rafique *alias* Feeqa and his brother Mushtaq Ahmad, he, along with his two nephews, namely, Muhammad Azam and Arshad Ali, the informant Arif Ali, and five other named persons, proceeded to the house of the accused party to lodge their protest. It was further alleged that when Bashir Ahmad, along with his eight companions, reached the *haveli* of the accused party, they found Muhammad Rafique duly armed with a 12 bore double barrel gun and Mushtaq Ahmad armed with a *sota* standing in the courtyard. After a brief exchange of words, it was Mushtaq Ahmad who was stated to have raised the *lalkara* and to have instructed Muhammad Rafique *alias* Feeqa to teach Muhammad Azam a lesson for disturbing the *khall*. Consequently, Muhammad Rafique fired a shot with his double barrel gun, which hit and injured Muhammad Azam on his left thigh, as a result thereof he fell down, and thereafter, as he was being shifted to Manga Mandi Hospital for medical treatment, he succumbed to his injuries.

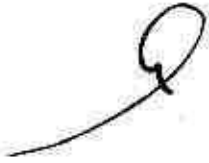
5. Muhammad Rafique and his brother were tried, which culminated in the conviction of Muhammad Rafique under section 302 (b) PPC, and he was sentenced to life imprisonment, and payment of Rs. 200,000 as compensation under Section 544-A of



the Code of Criminal Procedure, 1898 (Cr.P.C.) to be paid to the legal heirs of the deceased, and in default thereto, he was to undergo six months simple imprisonment. The benefit of Section 382-B of the Cr.P.C. was also extended to him. Mushtaq Ahmad, on the other hand, was given the benefit of doubt and was thus acquitted. Hence, the present appeal with the leave of the Court.

6. We have heard the learned counsel for the appellant, learned Additional Prosecutor General and the learned counsel for the complainant, and with their able assistance have gone through the entire record of the case.


7. The Achilles' heel of the prosecution's case is the very presence of the named eyewitnesses at the time and place of occurrence. To start with, the very reason for all the nine named persons to first gather and then to be present at the time of the occurrence at the *haveli* of the present appellant is not appealable to a prudent mind, especially when there is no evidence in support of the parties having a joint *khall* (water course), and the cutting of the same on the day of the occurrence was also not produced in evidence. To add to this crucial legal lapse, there is a marked delay in carrying out the post mortem of the deceased Muhammad Azam. According to the complainant's own version, which has been toed by other prosecution witnesses, the crime was committed at 05.30 p.m. at the *Dera of Ilam Din*, a locality in District Lahore, while the post mortem was carried out after a delay of nearly 22 hours on the next day at 03.00 p.m. at a public hospital in Lahore. One must be mindful of the fact that the incident took place in District Lahore, where there is no dearth of medical officers in public






hospitals who are available round the clock to carry out post mortem of deceased persons. When the Additional Prosecutor General and learned counsel for the complainant were confronted to explain the marked delay in carrying out the post mortem of Muhammad Azam, they were unable to point out any justifiable reason for the same in the entire record. Such unexplained delay in the post mortem of a deceased would surely put a prudent mind on guard to very cautiously assess and scrutinize the prosecution's evidence. In such circumstances, the most natural inference would be that the delay so caused was for preliminary investigation and prior consultation to nominate the accused and plant eyewitnesses of the crime. In similar circumstances, this Court, in the case of *Irshad Ahmad v. The State* (2011 SCMR 1190), observed that the noticeable delay in post mortem examination of the dead body is generally suggestive of a real possibility that time had been consumed by the police in procuring and planting eyewitnesses before preparing police papers necessary for the same. This view has been followed by this court in *Ulfat Husain v. The State* (2018 SCMR 313), *Muhammad Yaseen v. Muhammad Afzal and another* (2018 SCMR 1549), *Muhammad Rafique v. The State* (2014 SCMR 1698), *Muhammad Ashraf v. The State* (2012 SCMR 419) and *Khalid alias Khalidi and 2 others v. The State* (2012 SCMR 327).

8. The time-tested procedure set in place for the preservation of crime evidence under the Cr.P.C. and the Police Rules, 1934 (Rules) is essentially for its prompt recovery and safe custody till its secure production in evidence during the trial. The enabling provisions of the Cr.P.C. and the Rules envisage a chain of safe police custody of recovered crime evidence, which not only



ensures the preservation of the recovered evidence but also provides credence to the investigation carried out by the investigating officer. In regard to the unnatural death of a person, Section 174 of the Cr.P.C., *inter alia*, provides that the competent police officer, on receiving information of a person having committed suicide, or having being killed by another, or having died under circumstances raising reasonable suspicion that some other person might have committed an offence, is to proceed to the place where the dead body is laying, and after making requisite investigation, prepare his report of the apparent cause of death, the nature of wounds, fractures, bruises and other marks of injury that are inflicted on the dead body, and also stating what weapon or instrument, if any, might have caused the same. In case the competent police officer has doubt about the cause of death, he shall under Section 174(3) of Cr.P.C., forward the dead body along with the duly filled in prescribed form (Form No. 25.39 of the Rules), to seek a written opinion of a Civil Surgeon or notified Medical Officer, regarding the cause of death of the said dead person. The mode and manner in which the dead body is to be taken into custody, retained and then forwarded for the said examination of the medical officer has been prescribed under Rule 25.37 of the Rules. The relevant provisions of the aforementioned laws read as under:

**"174. Police to inquire and report on suicide, etc.-** (1) The officer in charge of a police-station or some other police-officer specially empowered by the Provincial Government in that behalf, on receiving information that a person—

- (a) has committed suicide, or
  - (b) has been killed by another, or by an animal, or by machinery, or by an accident, or
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- (c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence,

shall immediately give intimation thereof to the nearest Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the Provincial Government, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighborhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.

(2) The report shall be signed by such police-officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the [concerned] Magistrate.

(3) When there is any doubt regarding the cause of death, or when for any other reason the police-officer considers it expedient so to do, he shall, subject to such rules as the Provincial Government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the Provincial Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.


[(5) The Magistrates of the first class are empowered to hold inquests.]\*

**"25.37. Post-mortem examination - action to be taken by police:** When corpses are sent for medical examination the following rules shall be observed:

(1) The result of the investigating officer's examination of the body shall be carefully recorded in form 25.39(1). Clothing found on the body, foreign matter adhering to it and any instrument likely to have caused death remaining in a wound or on the body shall be secured in the position in which found, if possible, or, otherwise, shall be carefully packed separately, according to the instructions contained in rule 25.41.

(2) To counteract decomposition as far as possible the body shall be sprinkled with Formalin diluted to 10 per cent and shall also be so used with strong solution of chloride of lime in water. Bodies which have to be carried long distances should be sprinkled with the dry powder of chloride of lime or with carbolic powder sold commercially in tin boxes with a perforated lid specially constructed for sprinkling purposes. The use of powdered charcoal is prohibited, as the stains caused thereby may complicate the task of post-mortem examination.

(3) The body shall be placed on a charpoy or other light litter and protected from the sun, flies and exposure to the weather. The litter shall be transported to the place appointed for the holding of post-mortem examinations by such means as the investigating officer may consider most expedient in the circumstances of weather, distance to be covered and conditions of the body. If necessary and expedient conveyance, including a motor vehicle, may be hired to carry the corpse and those who are required to accompany it as escort or witnesses.





*(4) All police officers along the route are required to give immediate assistance to expedite the transportation of dead bodies for medical examination.*

*(5) Two police officers who have seen the dead body in the position in which it was first found, and are competent to detect any attempt at substitution or tampering with the body or its coverings, shall accompany the body to the mortuary, and remain in charge of it until the examination is complete. If necessary, an additional guard shall be supplied by the Lines Officer to place a sentry on the mortuary, but the officers who have accompanied the body from the spot shall hand it over personally to the medical officer conducting that post-mortem examination together with all reports and articles sent by the investigating officer to assist the examination and shall receive and convey to the investigating officer the postmortem report.*

*(6) As soon as the Civil Surgeon has intimated that his examination is complete, the police shall, unless they have received orders from a competent authority to the contrary, make over the body to the deceased's relatives or friends or, if there are no relatives or friends, or they decline to receive it, the police shall cause the body to be buried or burnt according to the rules framed in this behalf by the District Magistrate."*

*(emphasis provided)*

9. A careful review of the aforementioned provisions clearly reveals that once the dead body of a person, who died in unnatural and suspicious circumstances, is taken into custody by a Police Officer, the same remains under police custody until it is handed over to his relatives, and if the same are unknown, then till his burial. More importantly, the only person who can medically examine the dead body during the said police custody of the dead body is the medical officer, and that too, when the same is handed over to him by the police for its examination. For the purposes of the present case, it is crucial to note that, at the time of handing over a dead body by the police to the medical officer, all reports prepared by the investigating officer are also to be handed over in order to assist in the examination of the dead body.


10. Thus, once there is suspicion regarding the death of a person, the following essential steps follow: firstly, there is a complete chain of police custody of the dead body, right from the



moment it is taken into custody until it is handed over to the relatives, or in case they are unknown, then till his burial; secondly, post mortem examination of a dead person cannot be carried out without the authorization of competent police officer or the magistrate; thirdly, post mortem of a deceased person can only be carried out by a notified government Medical Officer; and finally, at the time of handing over the dead body by the police to the Medical Officer, all reports prepared by the investigating officer are also to be handed over to the said medical officer to assist his examination of the dead body.

11. It is usually the delay in the preparation of these police reports, which are required to be handed over to the medical officer along with the dead body, that result in the consequential delay of the post mortem examination of the dead person. To repel any adverse inference for such a delay, the prosecution has to provide justifiable reasons therefor, which in the present case is strikingly wanting.


12. What has further irked this Court is that in column No. 9 of the *Marg* Report (Ex.PW9/1), and even in the Post Mortem Report (Ex.PW10/A), the mouth of the deceased has been stated to be open, which clearly indicates that the dead body was not attended to by his close relatives after being pronounced dead. However, the stance set up by the prosecution in the present case is that Arshad Ali - the brother, and Nazir Ahmad - the uncle of the deceased Muhammad Azam were present at the time of his death, and remained with him, even thereafter. Thus, the said posture of the deceased raises an adverse inference against the prosecution's



version regarding the presence of the said persons at the place and time of occurrence.

13. Even the recovery of the weapon from the present appellant is legally inconsequential to connect him with the crime, as there is a negative report regarding the matching of the stated recovered crime empty from the spot. Even otherwise, the recovery of the crime empty is highly doubtful. It is noted that the complainant himself alleges in his initial report, and later testifies, that the present appellant fired one shot from his double barrel 12 bore gun, which was fatal. Under normal conditions, unlike a pistol, when one fire is shot from a 12 bore double barrel gun, the spent cartridge never ejects. In fact, it is only when the chamber of the barrel is opened for reloading, or any other purpose, that the ejection of the spent cartridge takes place. There is no such assertion by the prosecution that the present appellant reloaded or opened the chamber of his 12 bore double barrel gun. Thus, the recovery of the crime empty appears to be planted, casting serious doubt on the mode and manner in which the crime was investigated by the police, which had relatable effect upon the entire prosecution's case put up during the trial.

14. To sum up the above findings, it is noted that: the marked unexplained delay in the post mortem; the posture of the deceased at the time of his initial examination by the police and during his post mortem examination; recording of the crime by the police at the place of occurrence; the unexplained presence of the eyewitnesses at the time of the occurrence; and the lack of any cogent and reliable evidence adduced by the prosecution in





support of the reason advanced for their presence by the complaint are all strong circumstances which create a serious dent in the prosecution's case *qua* the presence of the eyewitnesses at the time and place of occurrence. Thus, when the very presence of the eyewitnesses is doubtful, then the veracity of their testimony would surely fall short of credence to saddle capital punishment upon the present appellant.

15. For the reasons stated hereinabove, we allow this appeal. The conviction and sentence of the appellant Muhammad Rafique are set aside. He is acquitted of the charge framed against him. He shall be released forthwith from jail, if not required to be detained in connection with any other case.

**ISLAMABAD**  
3<sup>rd</sup> April 2019

"Approved for reporting"

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