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Judgment Sheet
IN THE LAHORE HIGH COURT
MULTAN BENCH MULTAN
JUDICIAL DEPARTMENT

Criminal Appeal No.686 of 2012
(Javed v. The State)

and

Murder Reference No.6 of 2016
(The State v. Javed)

JUDGMENT

Date of hearing: 18.04.2017

Appellant by: Syed Badar Raza Gillani, Advocate.
Complainant By: Sardar Mehboob, Advocate.
State by: Mr. Muhammad Ali Shahab, Deputy
Prosecutor General.

Ch. Abdul Aziz, J. This judgment shall dispose of Criminal Appeal No.686 of 2012 filed by Javed, appellant (against conviction) and Reference sent by trial court under section 374 of Criminal Procedure Code, 1898 which is numbered as Murder Reference No.6 of 2016, for confirmation or otherwise of sentence of death awarded to Javed (convict). The appeal as well as the murder reference is originating from the judgment dated 25.10.2011 passed by the learned Additional Sessions Judge, Jalalpur Pirwala, arising out of case FIR No.288 dated 07.11.2007 registered under sections 302, 364 PPC at Police Station City Jalalpur Pirwala. Learned Additional Sessions Judge through the said judgment convicted and sentenced the appellant as under:-

Convicted under section 302 (b) PPC and awarded death sentence. The appellant was also directed to pay Rs.200,000/- as compensation to the legal heirs of the deceased under section 544-A Cr.P.C. and in default of

payment of the said amount, he was ordered to further undergo six months RI.

2. Briefly stated the case of the prosecution as unfolded by Manzoor Hussain (complainant), brother of Zahoor Hussain (deceased) in FIR (Exh.PD/1) is that he is resident of Kot Adil and is a businessman by profession, whereas his brother Zahoor Hussain used to deal in cotton and wheat. On 02.11.2007 at about 5:00 p.m., Zahoor Hussain while sitting in Bela Cotton Factory received an amount of Rs.5,25,000/- from Sajjad Hussain. When he was about to leave for his house, Javed (appellant) who was already present in the Factory, took him to Basti Chachran on the pretext of managing some Cotton for him. Zahoor Hussain left the Factory in the company of Javed (appellant) on a motorcycle, whereas the complainant returned to his house. Zahoor Hussain did not return to his house till late hours of the night. On the following day in the presence of Ashiq Hussain and Talib Hussain (PW.8), Javed (appellant) arrived at the house of Manzoor Hussain (complainant) and inquired about Zahoor Hussain (deceased). Manzoor Hussain (complainant) informed him that his brother was with him and had not yet returned home. Javed (appellant) left his house without offering any reply. After the departure of Javed (appellant), the complainant got curious and initiated his search efforts to trace his brother but could get no clue about him. Subsequently, the complainant again approached Javed (appellant) through respectable persons but failed to get any traces of his brother.

3. Niaz Ali Minhas Inspector (PW.13) on 07.11.2007 at 6:15 p.m. was present at Fawarah Chowk when Manzoor Hussain complainant approached him with the application (Exh.PD) which was sent to the police station for registration of FIR through Muhammad Tariq 3044/C. On the basis of this application, formal FIR (Exh.PD/1) was registered. After the

registration of FIR, Riaz Ali Minhas (PW.13) started the investigation of the case and recorded the statements of the witnesses. On 08.11.2007 at about 8:30 a.m. he received information through complainant about the dead body of the deceased, which was statedly lying in a well. In pursuance of this information, he proceeded to the scene and took into possession the dead body through memo (Exh.PR). After preparing the rough site plan (Exh.PS) of the place of recovery of dead body, he prepared the injury statement (Exh.PT) and inquest report (Exh.PU). He sent dead body of the deceased to the hospital under the escort of Maqbool Hussain 1800/C (PW.1) for the purposes of post-mortem examination. The Investigating officer also secured blood stained earth vide recovery memo (Exh.PG) as well as a crime empty of pistol .30 bore (P.1) vide memo (Ex.PF) from the crime scene. He also recorded the supplementary statement of the complainant under section 161 Cr.P.C. through which he stated that Javed (appellant) had committed the murder of Zahoor Hussain (deceased) in order to snatch the money. Javed (appellant) was arrested on 26.11.2007. On 28.11.2007, Javed (appellant) in pursuance of disclosure in police custody allegedly led to the recovery of .30 bore pistol (P.8) which was taken into possession vide recovery memo (Exh.PW). At the same time, the appellant also got recovered motorcycle (P.7) which was taken into possession vide recovery memo Exh.PO. During investigation, on 30.11.2007 Javed (appellant) also led to the recovery of one mobile phone along with broken SIM of Telenor (P.12) and an amount of Rs.2,70,000/- which were taken into possession through recovery memo (Exh.PK). On 29.11.2007 the appellant also got recovered sacks and pair of sleepers (P.3 & P.4) and diaries (P.5 & P.6) through recovery memos (Exh.PH and Exh.PJ respectively). He after completion

of investigation handed over the file to SHO for submission of challan.

4. The prosecution, in order to prove its case against the appellant produced thirteen PWs which include Muhammad Rafi (PW.5), Saeed Ahmad (PW.6) and Manzoor Hussain (PW.7), who furnished the last seen evidence, Hasnain Ahmad (PW.12), who narrated about the extra-judicial confession made by Javed (appellant) Dr.Muhammad Jalal (PW.4) who conducted the post-mortem examination of Zahoor Hussain (deceased) and Riaz Ali Minhas Inspector (PW.13) who conducted the investigation of this case. The remaining prosecution witnesses are more or less formal.

5. Dr. Muhammad Jalal (PW.4) on 08.11.2007 conducted the post-mortem examination of the dead body of the deceased Zahoor Hussain and observed the following injuries:-

1. A firearm wound of 1 cm in diameter, circular in shape on the front and lower part of the right side of the chest 8 cm below the right nipple. The wound was going deep. There was clotted blood on the margins of the wound. The margins were inverted and corresponding tears were present on the Qameez and Bunyan. Burning was present on the margins of the wound. Sign of inflammation were present on around the wound. This was wound of entrance.
2. A firearm wound of 2 cm in diameter, circular in shape on the back and lower part of the chest. Margins of the wound were everted. Clotted blood was present on the margins of the wound. There were signs of inflammation around the margins of the wound. It was 10 cm away from the midline. This was wound of exit. Wound was probed which was through and through to injury No.1.

According to the opinion of the doctor, injuries No.1 & 2 were caused by firearm weapon and were sufficient to cause death in ordinary course of nature. The cause of death described by the doctor was shock and haemorrhage due to injuries No.1 & 2. The probable time between injury and death was stated to be immediate and between death and post-mortem was described as within six days.

6. After the closure of prosecution evidence, the learned trial court examined Javed (appellant) under section 342 Cr.P.C. He in response to question “why this case against you and why the PWs have deposed against you”, made the following reply:-

“I am innocent. The instant case is false and is result of fabrication and concoction by the complainant party in connivance with police and one Sajjad “ARTHI” Manzoor Ahmad complainant was driver and has no cordial relationship with Zahoor Ahmad deceased. I was partner with Zahoor Ahmad in cotton business. After said murder of Zahoor Ahmad rendition of account 15 lac was outstanding towards Zahoor Ahmad deceased Sajjad Arthi only just to avoid payment of above said amount, complainant in league with Sajjad Aerthi and local police got registered case against me. In fact it was blind murder and it was talk of the town that one Hameeda Foji well known dacoit of area committed this murder. In this regard complainant also made application to local police. I am innocent and have committed no offence. PWs are closely related inter se and are under influence of complainant. They falsely deposed against me. No recovery was affected from me.”

Neither the appellant made statement under section 340(2) of Cr. P.C. nor produced any evidence in his defence.

7. After the completion of trial, the learned trial court convicted and sentenced the appellant as mentioned para one. Hence, the instant appeal and Murder Reference.

8. Learned counsel for the appellant contended that there is an inordinate delay of about five days in the registration of FIR and such delay is not explained in any manner; that the instant case is comprising upon circumstantial evidence wherein the necessary links to connect the appellant with the commission of offence are missing from the chain of circumstances; that the prosecution miserably failed to prove the motive which it took at the time of registration of FIR; that the learned trial court failed to appreciate that the last seen evidence furnished by the witnesses was not in consonance with the principle of proximity of time and distance; that the evidence of extra-judicial

confession is always considered a weak type of evidence and in the instant case the same besides being dubious in nature also remained uncorroborated; that the evidence of the recovery of the pistol and its subsequent matching with the crime empty is insignificant keeping in view the fact that both the articles were forwarded to Forensic Science Laboratory (FSL) together; that despite the fact, the discrepancies and shortcomings of the prosecution case giving rise to doubt about the involvement of the appellant in the commission of offence the learned trial court withheld its benefit from the appellant and such approach is contrary to the settled principles of Criminal Jurisprudence.

9. On the other hand, learned DPG assisted by learned counsel for the complainant vehemently controverted the arguments advanced on behalf of learned counsel for the appellant and submitted that though there is a delay in the registration of FIR but the same stands explained; that the delay in reporting the matter to the police occurred due to the fact that the complainant had been making efforts for the recovery of his brother, on his own; that the guilt of the appellant stands established on the basis of circumstantial evidence; that the chain of circumstantial evidence is comprising upon last seen evidence, extra-judicial confession of the appellant; that circumstantial evidence is further getting corroboration from the report of FSL according to which the pistol recovered from the appellant found wedded with the crime empty secured from the crime scene and that appellant also led to the recovery of an amount of Rs.2,75,000/- which became the cause of murder of the deceased.

10. Arguments heard and record perused with the able assistance of learned counsel for the respective parties.

11. The case of the prosecution, so to speak primarily hinges upon the circumstantial evidence comprising upon last seen evidence furnished by Muhammad Rafi (PW.5), Saeed Ahmad

(PW.6) and Manzoor Hussain (PW.7), the extra-judicial confession of the appellant made before Hasnain Ahmad (PW.12), the recovery of pistol (P.8) witnessed by Muhammad Riaz 1114/C (PW.11). The prosecution sought corroboration from the motive, as set out in the FIR.

12. The evidence of last seen initially was furnished by Manzoor Hussain (PW.7) at the time of registration of FIR. While appearing as a witness, he reiterated the same stance by stating that on 02.11.2007 at about 5:00 p.m. Zahoor Hussain (deceased), while in possession of an amount of Rs.5,25,000/-, which he received from Sajjad Hussain, left in the company of Javed (appellant). According to him, his deceased brother did not return home subsequent to that. The evidence of Manzoor Hussain (PW.7) was further supplemented by Muhammad Rafi (PW.5) and Saeed Ahmad (PW.6). The complainant is the real brother of the deceased, whereas Saeed Ahmad (PW.6) is his real nephew. As regards, Muhammad Rafi (PW.5), it has come on record that he is close relative of the deceased.

Manzoor Hussain (PW.7) while appearing as a witness stated that on 02.11.2007 at about 5:00 p.m., Zahoor Hussain (deceased) went to Bela Cotton Factory and received an amount of Rs.5,25,000/- from one Sajjad Hussain. At this juncture, Javed Hussain (appellant) took the deceased to the area of Basti Chachra, on the pretext of purchasing cotton. Admittedly, Sajjad Hussain, from whom the deceased received the amount of Rs.5,25,000/- and in whose presence he left in the company of the appellant, was neither produced during the course of investigation nor at the time of trial. Even otherwise, it came on record that Manzoor Hussain (PW.7) was not in best of terms with Zahoor Hussain (deceased). Previously, both the brothers were in a joint business, however, parted their ways on account of a dispute arising out of rendition of accounts and over a piece of land. In this respect, it would be appropriate to have a glance

over the relevant extract from the testimony of Manzoor Hussain (PW.7) which is as under:-

“I and my brother live separately. Zahoor was in business of cotton along with Javed accused. In the days of occurrence I was doing my private business. 2/3 years prior to occurrence I and my brother jointly in one business of cotton. Later on we separated our business. It is correct that there was some dispute for rendition of account between me and my brother and my father transferred one Biga of land in favour of Zahoor deceased. The said one Biga was my share.”

The above-mentioned extract, coupled with the delay with which, he reported the matter to the police, casts big doubt about his testimony. This is not understandable that if at all he had seen the deceased, while leaving in the company of the appellant then why he remained silent for a period of five days. Moreover, he failed to bring on record, any evidence in support of his claim that during this period he had been searching for his slain brother.

The second string of last seen evidence is comprising upon the statement of Muhammad Rafi (PW.5) and Saeed Ahmad (PW.6). It is important to mention here that neither at the time of registration of FIR, nor at the time of recording of his statement in the court, Manzoor Hussain (PW.7) ever made any reference to these PWs. We have already discussed above that the two PWs are closely related with the deceased as well as with the complainant. According to these PWs, they saw Zahoor Hussain (deceased) in the company of Muhammad Javed (appellant) at 6:00 p.m. while on their way to home from Pull Patian Wala. None of these PWs mentioned the exact date when they saw the deceased and the appellant. It is important to mention here that the shop of Saeed Ahmad (PW.6) is stated to be situated at a distance of approximately 8/9 kilometers from the Pull Pattian Wala. An in-depth scrutiny of the testimony of the PWs reveals that they have assigned no reason of their

presence at the place, where they saw the deceased and the appellant. Such aspect gains more importance keeping in view the fact that even according to the PWs, the darkness had prevailed at that time. Muhammad Rafique (PW.5) candidly admitted that they had no business work at Pull Patian Wala. In this backdrop, we are constrained to observe that the witnesses failed to reasonably justify their presence at the relevant place.

According to the record, Muhammad Javed (appellant) was arrested on 26.11.2007. The statements of these two PWs were recorded subsequent to the arrest of Muhammad Javed. In this respect, the relevant portion of the statement of Saeed Ahmad (PW.6) is being reproduced below:-

“At the time of recording of our statement Javed accused was in police custody and police also interrogated from Javed accused in my presence.”

Such extract from the testimony of Saeed Ahmad (PW.6) leads this Court to the conclusion that the statements of these two PWs were recorded under section 161 Cr.P.C. with a delay of about 19-days of the registration of FIR. The delay in recording the statements of these witnesses casts serious doubt about their credibility. The Hon’ble Supreme Court of Pakistan has held in the case of Muhammad Khan v. Maula Baksh and another (1998 SCMR 570) as under:-

“It is a settled law that credibility of witness is looked with serious suspicions if his statement under section 161 Cr.P.C. is recorded with delay without offering any plausible explanation.”

Similarly, in another case titled as Rahat Ali v. The State (2010 SCMR 584) the Hon’ble Supreme Court of Pakistan observed as under:-

“delay in recording the statement of witness without furnishing any plausible explanation, is also fatal to prosecution case and the statement of such witness is not to be relied upon”

It needs no discussion to elaborate as to how the last seen evidence is defined. It stands for the statements of the witnesses

who claim to have seen the deceased last time alive in the company of the accused. In order to bring home, the guilt of an accused, the prosecution is further required to prove the proximity of time and proximity of distance. In order to prove these two ingredients the prosecution is obliged to bring on record the duration between the time when the deceased was last time seen alive and the time when he met his death. The more is the duration the weaker will become the evidence of last seen. Likewise, the prosecution is saddled with the responsibility of proving the proximity of distance by bringing on record the distance between the two places i.e. the place where the deceased was seen in the company of the accused and the place from where his dead body was recovered. These two ingredients, if proved, will exclude the hypothesis of the innocence of the accused and will reduce the possibility that the deceased was done to death by a person other than the accused. In this regard, this Court is enlightened from the observation of Hon'ble Supreme Court of Pakistan in the case of Rehmat alias Rhaman alias Waryam alias Badshah v. The State (PLD 1977 SC 515) wherein, the Hon'ble Supreme Court of Pakistan observed as under

“On a balance of the decided cases, it appears that the circumstances of the deceased having been last seen in the company of the accused is not by itself sufficient to sustain the charge of murder. Further evidence is required to link the accused with the murder of his companion. Such as incriminating recoveries at the instance of accused, a strong motive or the proximity of the time when they were last seen together and the time when the deceased was killed. Only then will the accused be called upon to give an explanation of the demise of the person who was last seen alive in his company”.

It evinces from the recital of the prosecution evidence that no distance between the two places i.e. the place where the deceased and the appellant were seen by the witnesses and the place from where his dead body was recovered, is brought on record. Even otherwise, the last seen evidence is always

regarded as a weak type of evidence and in order to award conviction on the basis thereof, independent corroboration is required which is missing in this case. In the absence of such corroboration, it is never safe to award conviction, solely on the basis of last seen evidence. In this respect, reliance is placed to the case of Altaf Hussain v. Fakhar Hussain and another (2008 SCMR 1103) wherein the Hon'ble Supreme Court of Pakistan observed at page 1105 as under:-

“It is settled principle of law that the last seen evidence is a weakest type of evidence unless corroborated with some other piece of evidence which is conspicuously missing in this case.”

13. The evidence of extra-judicial confession was furnished by Hasnain Ahmad (PW.12), who is the cousin (Khalazad) of Manzoor Hussain (PW.7) as well as of Zahoor Hussain (deceased). Neither he mentioned the date nor the exact time, when Javed (appellant) approached him for the purposes of seeking pardon on the basis of admission of his guilt. At the eventful time, Hasnain Ahmad was sitting in the company of Haji Karim Baksh (given up as having been won over). On account of non-production of Haji Karim Baksh as a witness, the statement of Hasnain Ahmad (PW-12) remained uncorroborated. The two witnesses were sitting in a hotel situated at Alipur Saddat Morr. According to the statement of PW.12, Alipur Saddat Morr is a very busy place comprising upon 15/20 shops and situated adjacent to Bela Cotton Factory as well as Shabbir Cotton Factory. It is further stated by PW.12 that the hotel where they were sitting is crowded by 15/20 persons, round the clock. Similarly, 100/150 persons remain available in the surrounding shops. Surprisingly Hasnain Ahmad (PW.12), despite being close relative of the deceased more so who remained concerned in the search efforts, made no effort to apprehend the appellant. What to talk of making a

personal effort, he called none from the vicinity to apprehend the appellant for the murder of the deceased. Such conduct of the witness renders him unworthy of credence as his response to the confession of the appellant is found to be contrary to the natural human conduct. This aspect gains more importance, when seen in the context that the PW mentioned neither the date nor the exact time of the event. The evidence of extra-judicial confession is always regarded as weak type of evidence. Normally such evidence is procured when the prosecution is running short of requisite incriminating material to connect a person with the commission of crime. In support of our above-findings reference is made to the cases of Muhammad Aslam v. Sabir Hussain and others (PLJ 2010 S.C 513), Muhammad Shafique alias Chuma v. The State (2009 SD 40), Sarfraz Khan v. The State, etc. (NLR 1996 Criminal 114) and Imran alias Dully and another v. The State and others (2015 SCMR 155).

14. We have also given a considered thought to the motive, which was set out by the complainant at the time of the registration of FIR. Initially, the complainant came forward with the stance that his brother was abducted and done to death by the appellant in order to snatch the amount of Rs.5,25,000/- which he received from Sajjad Hussain. However, while appearing as a witness in the dock, he took a topsy turvy stance by saying that his brother was having an amount of Rs.2,75,000/- and Motorola mobile phone. In our humble view, the non-production of Sajjad Hussain PW left a big dent in the veracity of the prosecution story so far as it relates to the fact that the deceased was having such amount in his possession. The only inference, which we can draw from the non-production of Sajjad Hussain as a witness, during investigation as well as in trial is in accordance with Article 129 illustration (g) of Qanun-e-Shahadat Order 1984, which reads as under:-

129. Court may presume existence of certain facts.

The Court may presume the existence of any fact, which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and the public and private business, in their relation to the facts of the particular case.

Illustrations

The court may presume:

- (g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

The Hon'ble Supreme Court of Pakistan in the case of Muhammad Rafique, etc. v. State & others (PLJ 2011 SC 191)

held as under:-

“that if any party withholds the best piece of evidence then it can fairly be presumed that the party had some sinister motive behind it. The presumption under Article 129 (g) of Qanun-e-Shahadat Order can fairly be drawn that if PW would have been examined, his evidence would have been unfavourable to the prosecution”.

15. The recovery of Motorola mobile phone is insignificant in nature, keeping in view the fact that the mobile phone was not mentioned in the FIR, which otherwise was registered with delay of about five days.

As regards, recovery of pistol (P.8) and its subsequent matching with the crime empty (P.1) secured during spot inspection, suffice it to say that both the articles were forwarded to FSL on the same day and that too after the arrest of the appellant. Hence, the report of the FSL is of no legal worth. According to the record, the pistol (P.8) as well as the crime empty (P.1) was dispatched to the FSL under the escort of Muhammad Riaz 1114/C on 04.12.2007.

Similarly, the recoveries of other articles like diaries of the deceased, the motorcycle (P.7) belonging to the appellant and the recovery of sacks is also of no legal consequence. As it is not expected from the accused that he will keep these articles in safe custody so as to be recovered from him by the police,

such aspect is against natural human conduct as the accused will try to get rid of such articles in order to erase evidence against him. It is settled proposition that one tainted piece of evidence cannot provide corroboration to some other fabricated and frail evidence. In this respect, reliance can be placed to the case of Azeem Khan and another v. Mujahid Khan (2016 SCMR 274).

16. The nutshell of the above-discussion is that the prosecution miserably failed to prove the guilt of the appellant. The last seen evidence as well as the extra-judicial confession of the appellant remained uncorroborated and got no support from any other independent circumstance. Even otherwise, the evidence of last seen is not found to be of par excellence and of the required standard for upholding the conviction of the appellant. The chain of circumstantial evidence is found to be broken and many links missing therefrom. It is settled principle of appraisal of evidence in such like cases that the circumstances should give the picture of complete chain, one corner of which should touch the dead body of the deceased and the other, the neck of the accused. Failure of one link will destroy the entire chain. The evidence of recovery of pistol and other articles are found to be inconsequential in nature in the attending circumstances. The simple recital of the prosecution evidence, on account of shortcomings and discrepancies discussed above, giving rise to many doubts about the guilt of the appellant. This is a golden principle of Criminal Jurisprudence that the accused is entitled to the benefit of every reasonable doubt, arising out of the case. In this view of the matter, we are of the view that the conviction and sentence awarded to the appellant is unwarranted. Consequently, Criminal Appeal No.686 of 2012 is accepted and conviction and sentence of Javed (appellant) is set-aside and he is acquitted

of the charge. He shall be released forthwith if not required to be detained in any other criminal case. Resultantly Murder **Reference No.6 of 2016** is answered in the **NEGATIVE** and Death Sentence awarded to Javed (appellant/convict) is **NOT CONFIRMED.**

(Abdul Sami Khan)
Judge

(Ch. Abdul Aziz)
Judge

APPROVED FOR REPORTING

(Ch. Abdul Aziz)
Judge

*Najum**