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Judgment Sheet

IN THE LAHORE HIGH COURT MULTAN BENCH, MULTAN

(JUDICIAL DEPARTMENT)

Criminal Appeal No.18-J of 2016

Barkat Ali versus The State

Murder Reference No.66 of 2016

The State versus Barkat Ali

Date of hearing	**08.11.2017**
The Appellant by	M/s Malik Muhammad Saleem, Muhammad Zahid Khan Khichi and Qari Abdul Karim Shahab, Advocates
The Complainant by	Ch. Amir Sohail Dhilon, Advocate
The State by	Mr. Muhammad Ali Shahab, Additional Prosecutor General

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Asjad Javaid Ghural, J. Through the afore-titled criminal jail appeal under Section 410 Cr.P.C., appellant Barkat Ali has challenged the vires of judgment dated 20.01.2016 passed by the learned Additional Sessions Judge, Burewala in case FIR No.87 dated 13.03.1991, in respect of offences under Sections 302, 148 & 149 PPC, registered at Police Station, City Burewala District Vehari whereby he was convicted and sentenced as under:-

Under Section 302(b) PPC

Death and to pay the compensation of Rs.100,000/- to the legal heirs of deceased Atta Muhammad in terms of Section 544-A Cr.P.C. and in case of default, to further undergo simple imprisonment for six months.

2. *Murder Reference No.66 of 2016* for confirmation or otherwise of death sentence of appellant Barkat Ali shall be decided through this single judgment.

3. The prosecution story unfolded in the crime report (Ex.PD) is that on 13.03.1991 at 7:30 p.m., complainant Riaz Ahmad (PW-6) alongwith his

brothers Muhammad Hanif, Atta Muhammad and one Manzoor Ahmad boarded on Wagon No.2333/MNL in order to attend the Court of learned Additional Sessions Judge, Burewala whereas Barkat Ali (appellant) boarded on the roof of the wagon. At about 8:30 a.m., the wagon stopped at Adda Kachi Pakki, Barkat Ali had de-boarded from the roof of the wagon, they were about to de-board from the wagon, when all of a sudden Mansha, Iqbal, Sharif and Muhammad Tufail came behind them on a white jeep being driven by Iqbal, who raised a Lalkara to do away with Atta Muhammad whereupon Barkat Ali took out his pistol 12-bore and raised a Lalkara to take the revenge of murder of Muhammad Sharif and fired at Atta Muhammad, which hit at the right side of his neck and he fell down on the ground. They tried to apprehend Barkat Ali but they succeeded to flee away from the place of occurrence. Atta Muhammad succumbed to the injuries at the spot.

The motive behind the occurrence was that in the year, 1987, one Muhammad Sharif had been murdered during a fight in their Chak wherein the deceased was facing the trial. Barkat Ali alongwith his co-accused had murdered Atta Muhammad to take the revenge of his cousin (Khalazad) Muhammad Sharif.

4. Mehboob Ahmad, Inspector (PW-8) had inspected the place of occurrence, prepared injury statement Ex.PK and inquest report Ex.PL of the deceased and escorted the dead body to mortuary, secured blood through cotton vide recovery memo Ex.PF, prepared site plan without scale of the place of occurrence Ex.PM and recorded the statements of witnesses under Section 161 Cr.P.C. He arrested appellant Barkat Ali on the same day. On 14.03.1991 the appellant led to the recovery of a revolver 32-bore alongwith five live rounds, which was taken into possession vide recovery memo Ex.PH. He got the appellant medically examined from Tehsil Headquarter Hospital, Burewala. On 27.03.1991, the appellant led to the recovery of pistol 12-bore (P-5) alongwith a cartridge (P-6), which was taken into possession vide recovery memo Ex.PE. He recorded the statements of witnesses under Section 161 Cr.P.C. and after completion of investigation,

handed over the case file to the Station House Officer for the preparation of report under Section 173 Cr.P.C.

5. Dr. Muhammad Iqbal (PW-5) had conducted autopsy on the dead body of deceased Atta Muhammad on 13.03.1991 and observed as:-

> *A fire arm wound 3 cm in diameter with inverted blackened edges just on the medial end of the right clavicle. The medial end of right clavicle and right first rib at its medial end were fractured, the pleura was perforated anteriorly and pleural cavity was full of blood, right lung was perforated at upper and middle lobes, right seventh rib was fractured at the posterior end. Two mantellic pieces were recovered from muscles at the back of chest and a plastic piece was recovered from front portion of the wound (wound of entry).*

The cause of death was hemorrhage and shock due to injury No.1, which was ante-mortem and sufficient to cause death having been caused by fire arm weapon. The probable duration between injuries and death was only few minutes whereas between death and post mortem examination about 7-hours.

6. Learned trial Court summoned the appellant and his co-accused Muhammad Mansha, Muhammad Iqbal, Muhammad Tufail and Muhammad Sharif but during trial the appellant absconded himself and he was declared proclaimed offender on 02.04.1995. Upon conclusion of the trial, aforesaid co-accused were acquitted of the charge vide judgment dated 26.06.1995.

7. The appellant was arrested in this case on 11.09.2009 and incomplete report under Section 173 Cr.P.C. was submitted before the learned trial by the Station House Officer Police Station City Burewala.

8. At the commencement of trial, the learned trial Court had framed a charge against the appellant to which he pleaded not guilty and claimed to be tried.

9. The prosecution had produced 08-witnesses besides the report of Chemical Examiner (Ex.PQ) and the report of Serologist (Ex.PP). The appellant, in his statement recorded under Section 342 Cr.P.C., had denied and controverted all the allegations leveled against him, he neither opted to make statement under Section 340(2) Cr.P.C., nor had he produced any witness in his defence.

10. Learned trial Court, upon conclusion of the trial, had convicted and sentenced the appellant supra vide impugned judgment dated 07.05.2010. The appellant preferred Criminal Appeal No.930 of 2011 against his conviction wherein the aforesaid judgment dated 07.05.2010 was set aside, connected Murder Reference No.126 of 2010 was answered in negative and the case was remanded to the learned trial Court for re-recording the statement of appellant under Section 342 Cr.P.C. vide judgment dated 18.12.2015.

11. On receiving the case file, learned trial Court re-write the statement of the appellant under Section 342 Cr.P.C. and after hearing learned counsel for the parties, proceeded to convict and sentence the appellant vide impugned judgment dated 20.01.2016. Hence, the criminal appeal in hand as well as the connected Murder Reference No.66 of 2016.

12. Learned counsel for the appellant has contended that the appellant is quite innocent and has been falsely entangled in this case; that the appellant had nothing to do with the murder in issue as the murder of his cousin (Khalazad) namely Muhammad Sharif had been committed way back in the year, 1987 and during the interregnum, no untoward incident had ever taken place; that the ocular account furnished by Riaz Ahmad (PW-6) and Muhammad Hanif (PW-7) is not in consonance with the medical evidence qua the seat and the direction of the fire arm injury, which speaks otherwise with regard to the mode and manner ascribed by the prosecution; that the medical officer had observed blackening and burning on the injury sustained by the deceased, which is in contradiction with the scaled site plan mentioning inters-se distance between the deceased as well as the assailant as 8/9 feet; that both the claimed eye witnesses were chance witnesses and they had no occasion to be present at the venue of occurrence at the relevant time; that the dead body of the deceased had been conducted with considerable delay of 7-hours though it had been dispatched to the mortuary within a few minutes, which shows that the time had been consumed to cook up a false story for the prosecution; that the motive remained shrouded in mystery being not proved through any independent source; that the crime empty as well as the weapon of offence had been dispatched to the office of

Ballistic Expert but the prosecution had withheld the report of Ballistic Expert, which indicates that the same was not in favour of the prosecution version; that the prosecution could not establish the charge against the appellant beyond reasonable shadow of doubt. Finally, a prayer for acceptance of the appeal and acquittal of the appellant has been made.

13. Conversely, learned Deputy Prosecutor General assisted by learned counsel for the complainant has contended with vehemence that it was a day light occurrence, which had taken place at a busy place at the Wagon stand; that the matter was reported to the police with sufficient promptitude containing the name of appellant being sole perpetrator of the murder in issue, which excluded the possibility of false implication of the appellant with deliberation and consultation; that both the eye witnesses, as per tendency of our rural setup, had sufficiently explained their presence to accompany the appellant for appearing in the Court of learned Additional Sessions Judge to face the trial of murder of one Muhammad Sharif; that both the eye witnesses had direct blood relation with the deceased and in such a close relationship, substitution is a rare phenomena; that keeping in view the length of arm and fire arm weapon, the medical evidence is in line with the ocular account observing blackening on the injury sustained by the deceased; that the motive has successfully been proved by the prosecution rather admitted by the defence being not cross-examined on this point; that the recovery of weapon of offence at the instance of the appellant, provided full corroboration to the ocular account; that the prosecution has successfully proved the charge against the appellant. At the end, a prayer for dismissal of the appeal has been made.

14. We have heard learned counsel for the appellant, learned Deputy Prosecutor General appearing for the State assisted by learned counsel for the complainant and have perused the record with their able assistance.

15. This unfortunate incident had taken place on 13.03.1991 at 8:30 a.m., which was reported to the police at a distance of 2 ½ kilometer from the place of occurrence, on the same day at 8:45 a.m. within the shortest possible time containing the name of the appellant being a sole perpetrator of the murder in issue with the full detail of the mode and manner of the

occurrence, which excludes every hypothesis of deliberation, consultation and fabrication. The murder in issue was claimed to have been witnessed by Raiz Ahmad (PW-6)/complainant and Muhammad Hanif (PW-7), both real brothers of the deceased and one Manzoor Ahmad. The mainstay of the prosecution is the testimony of complainant Riaz Ahmad and Muhammad Hanif. The complainant had appeared in the dock in the courtroom and reiterated his earlier statement recorded under Section 154 Cr.P.C. before the police deposing that on the fateful day at 7:30 p.m., he alongwith his brothers Muhammad Hanif, Atta Muhammad and one Manzoor Ahmad had boarded on a Wagon No.2333/MNL in order to attend the Court of learned Additional Sessions Judge, Burewala, Barkat Ali had to attend the Court, who was facing the trial of murder of one Muhammad Sharif., Barkat Ali (appellant) also boarded on the roof of the wagon, at about 8:30 a.m., the wagon stopped at Adda Kachi Pakki, they were about to de-board from the wagon, Barkat Ali had de-boarded from the roof of the wagon when all of a sudden Mansha, Iqbal, Sharif and Muhammad Tufail came behind them on a white jeep being driven by Iqbal, who raised a Lalkara to do away with Atta Muhammad whereupon Barkat Ali took out his pistol 12-bore and raised a Lalkara to take the revenge of murder of Muhammad Sharif and fired at Atta Muhammad, which hit at the right side of his neck, he fell down on the ground and succumbed to the injuries at the spot. Muhammad Hanif (PW-7) supplemented the complainant on each and every limb of the occurrence. They were cross-examined by the defence at considerable length but they remained affirm and consistent on all material particulars and the defence remained fail to extract any material from their mouths, which could have been used favourable for the defence. Both the eye witnesses had explained satisfactorily qua the time, date, place, mode and manner of the occurrence. The defence was at its toe to shatter the credibility of the eye witnesses during cross-examination but it could not succeed. Learned counsel for the appellant has contended that the medical officer had recovered two metallic pieces from the muscles at the back of chest, 4 c.m. towards right from the mid-line of the dead body of the deceased, which indicates that the person, who had fired upon the deceased was at a higher pedestal, which creates

doubt about the presence of the claimed eye witnesses at the venue of occurrence. We are not in agreement with the said contention of learned counsel for the appellant because at the time of firing when the assailant had aimed his fire arm weapon towards the person being targeted, had naturally and essentially changed the position to save his life and it was quite possible that at the time of hitting fire shot at clavicle bone, being a hard object, the bullet had changed its direction. Even otherwise, the person being targeted, was not a statue, who before hitting the fire shot, had made suitable movement in order to save his life. It is worth mentioning here that none else but the appellant alone is claimed to have fired at the deceased and there remain no doubt with regard to the actual culprit for causing fire arm injury to the deceased. Both the parties were residing at a distance of 40-kilomoters away from the place of occurrence, the police recorded the statements of witnesses under Section 154 & 161 Cr.P.C. at the spot, the case was registered within 15-minutes of the occurrence and both the eye witnesses had no other business whatsoever to be present at the place of occurrence than that claimed by the eye witnesses. In this backdrop, it was not possible for the eye witnesses to reach at the place of occurrence within such short span of time. Both the eye witnesses were real brothers of the deceased and in such a close relationship, substitution of a real culprit with an innocent person is a rare phenomenon. The only possible conclusion is that both the eye witnesses were present at the time and place of occurrence and they had narrated what they had witnessed at the time of occurrence.

So far as the presence of blackening at the fire arm injury sustained by the deceased, as observed by the medical officer, from a distance of 8/9 feet, as mentioned in the scaled site plan as well as deposed about by the claimed eye witnesses, is concerned, we have observed that the length of fire arm weapon as well as the length of appellant's arm covers the distance of at least three feet and by excluding the said distance, the remaining actual distance leaves not more than five feet, which is also the prosecution's case. The blackening on the fire arm wound is exactly in consonance with the ocular account furnished by the prosecution.

16. No doubt that the autopsy on the dead body of deceased Atta Muhammad had been conducted with the delay of seven hours but we could not find out any sort of element showing the possibility of deliberation, consultation and fabrication on part of the police or the complainant. The occurrence had taken place at 8:30 a.m., the police reached at the spot sharply and the case was registered at 8:45 a.m., the police proceedings were completed at the spot, the dead body of the deceased was escorted to the mortuary with complete documents and the autopsy was conducted at 3:45 p.m. within 06-hours and 45-minutes. The plausible delay apparently caused by the hospital authorities, does not draw any adverse inference under some speculations as to the prosecution's claim.

17. Both the claimed eye witnesses had furnished the reason of their accompanying deceased Atta Muhammad at the time and place of occurrence that they were associating him, who had to appear in the Court of learned Additional Sessions Judge, Arifwala to face the trial with regard to case of the murder of one Muhammad Sharif. It is quite natural and believable in our rural set-up usually some nearer and dearer of an accused facing the trial of murder cases accompany him to coop with any untoward situation. Both the eye witnesses alongwith with one Manzoor Ahmad had accompanied the deceased on the day of occurrence when this unfortunate incident had taken place on their way to the Court. Anyhow, both the eye witnesses were not cross-examined by the defence with regard to the factum of their '*Paishi*' in the court of learned Additional Sessions Judge, which shows that the defence was fully aware of the fact that the deceased was in fact going to attend the Court on that day.

18. Dr. Muhammad Iqbal (PW-5) had conducted autopsy on the dead body of deceased Atta Muhammad on 13.03.1991 and observed a fire arm wound 3 cm in diameter with inverted blackened edges just on the medial end of the right clavicle causing fracture to the medial end of right clavicle and right first rib, perforating the pleura anteriorly and the right lung at upper and middle lobes, fracturing the right seventh rib at the posterior end. Two metallic pieces were recovered from muscles at the back of chest and a plastic piece was recovered from front portion of the wound (wound of

entry). The said ante-mortem fire arm injury was opined to be the cause of death with the duration of only few minutes between injury and death. The number, nature and the locale of injuries, kind of weapon used and the cause of death are exactly in consonance with the ocular account. The medical evidence is in full support to the ocular account.

19. The motive as set up by the prosecution in the crime report was that in the year, 1987 one Muhammad Sharif, maternal cousin (Khalazad) of appellant Barkat Ali, was murdered and a case was registered against deceased Atta Muhammad but the appellant had murdered him in order to take the revenge of murder of Muhammad Sharif. The aforesaid occurrence had taken place way back in year, 1987 and during the interregnum no untoward incident had ever taken place. Aforesaid Muhammad Sharif had other close relatives such as father, mother, brother, sisters and paternal and maternal cousins but what prompted the appellant, after about four years of the aforesaid occurrence, to murder Atta Muhammad, which is indicative of the possibility that the complainant had tried to connect his previous enmity with the murder in issue and suppressed some real facts actually what in fact happened just before the occurrence. The prosecution could not establish the real cause of the murder in issue, which remained shrouded in mystery.

20. The appellant was arrested in this case on the same day of occurrence i.e. 13.03.1991 and during investigation, in pursuance to his disclosure, he led to the recovery of a revolver 32-bore and a pistol 12-bore, which were secured vide recovery memos Ex.PH and Ex.PE respectively. During trial the prosecution had produced pistol 12-bore (P-5) before the learned trial Court being the weapon of offence. Muhammad Arshad 790/C (PW-1) had dispatched the weapon of offence alongwith an empty cartridge, secured from the place of occurrence, to the office of Ballistic Expert but no report of Ballistic Expert could be brought on record. The prosecution had withheld the report of Ballistic Expert, which is presumptive of the fact under Article 129(g) of the Qanoon-e-Shahadat Ordinance, 1984 that had it been produced before the learned trial Court, it would have not supported the prosecution version. The claimed recovery of weapon of offence at the instance of the appellant, lends no corroboration to the ocular account but non-proving the

recovery of weapon of offence, being corroboratory piece of evidence, does not discard the entire prosecution evidence.

21. The appellant remained fugitive from law for about 18-years, after his release on bail and was again arrested in this case on 19.09.2009. He deliberately concealed himself and avoided to face the consequences of his act of the murder, which clearly shows his guilty conscious. Had he been not involved in this occurrence, he would have dared to appear before the Court of law and face the legal process. The appellant's abscondance for about two decades draws an adverse inference against him about his guilty conscious.

22. We have no doubt in our mind that the prosecution has been able to bring home guilt of the appellant to the hilt by producing cogent, convincing and confidence inspiring ocular account being supported by the medical evidence. It was a day light occurrence, which was reported to the police with sufficient promptitude. The place of occurrence was a busy bus stop surrounded by different shops and, thus, the incident in issue could not be termed as an unwitnessed or unattended occurrence. The prosecution has proved the claimed presence of both the eye witnesses at the place of occurrence beyond reasonable shadow of doubt having accompanying their real brother Atta Muhammad deceased, who had to appear in the Court of learned Additional Sessions Judge to face the trial of murder of Muhammad Sharif, a maternal cousin of the appellant. Both the prosecution witnesses of ocular account remained consistent and affirm on all material particulars of the murder in issue. No material variation or contradiction in the prosecution evidence could be pointed out by the learned counsel for the appellant. We have no legitimate exception to differ with the conclusion arrived at by the learned trial Court qua the conviction of the appellant but so far as the quantum of sentence is concerned, we have observed certain factors flouting on surface of the record. Firstly, it was a single fire shot injury and the appellant had not repeated the same, secondly, the motive behind the occurrence remained shrouded in mystery and thirdly, the recovery of weapon of offence remained inconsequential. It is settled and longstanding principle by now that non-proving the motive behind the occurrence by the

prosecution has bearing upon the question of quantum of sentence. Reliance is placed on case titled "NAVEED alias NEEDU and others versus The STATE and others" **(2014 SCMR 1464)**. The relevant dictum at page No.1468 reads as under:-

> "failure of the prosecution to prove the motive set up by it may have a bearing upon the question of sentence and in an appropriate case such failure may result in reduction of a sentence of death to that of imprisonment for life for safe administration of justice.

It is also settled principle of law by now that when a case qualifies the awarding of both sentences of imprisonment for life and that of the death, the proper course for the Courts, as a matter of caution, is to give preference to the lesser sentence. We seek guidance in this respect from case titled "GHULAM MOHY-UD-DIN alias HAJI BABU and others versus The STATE" **(2014 SCMR 1034)** wherein it has been observed at page 1044 as:-

> "In any case, if a single doubt or ground is available, creating reasonable doubt in the mind of Court/Judge to award death penalty or life imprisonment, it would be sufficient circumstances to adopt alternative course by awarding life imprisonment instead of death sentence."

23. In view of what has been discussed above, *Criminal Appeal No.18-J of 2016* filed by appellant Barkat Ali is without any merit, the same stands ***dismissed*** by maintaining his conviction, however the sentence of death in an offence under Section 302(b) PPC is modified to the imprisonment for life. The amount of compensation as well as the sentence in lieu thereof shall remain intact. The benefit of Section 382-B Cr.P.C. is extended to the appellant.

24. **Murder Reference No.66 of 2016** is answered in the **NEGATIVE** and the Death Sentence awarded to appellant Barkat Ali is **not confirmed**.

(Sardar Muhammad Sarfraz Dogar)
Judge

(Asjad Javaid Ghural)
Judge

*Asif**

APPROVED FOR REPORTING.

JUDGE