

IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

1. Criminal Appeal No.1304 of 2013
(Muhammad Fayyaz Vs. The State)

&

2. Capital Sentence Reference No.21-T of 2013
(The State Vs. Muhammad Fayyaz)

Date of hearing: 07.11.2017
Appellant by: M/s Burhan Moazam Malik and Muhammad Azhar Choudhry, Imran Aslam Kharal, Advocates.
Complainant by: Mr. Muhammad Ahsan Bhoon, Advocate.
State by: Mr. Muhammad Zubair Khalid Choudhry, D.P.G.

OAZI MUHAMMAD AMIN AHMED, J:-. Ansar Iqbal, 35, Muhammad Riaz, 20 and Bilal, 19, henceforth referred to as the deceased, were gunned down on 25-8-2010 at 2:30 p.m. within the area of *Khawaja Bazar Loianwala* situating at a distance of 2 ½ k.m. from Police Station Arup, Gujranwala where it was reported by Shahid Iqbal at 3:35 p.m. same day. According to the complainant, real brother of Ansar Iqbal deceased, the deceased left their village for their *Dera* in a jeep; as they went past railway crossing in *Khawaja Bazar*, Fayyaz Ahmad, Muhammad Asif, Muhammad Arshad, Muhammad Amjad, Muhammad Ansar, Qaisar Iqbal accompanied by three unknown persons, armed with rifles, all of a sudden, confronted the entourage with indiscriminate firing, resulting into immediate death of Ansar Iqbal and Riaz Khan within the view of Muhammad Mansha (PW-11) and Muhammad Azam (PW-12) besides the complainant. Bilal, in injured condition, was rushed to the hospital where he was pronounced dead. Motive for the crime is string of criminal cases raging between the two sides.

As aftermath, panic gripped the neighbourhood while the accused decamped from the scene, read the First Information Report. Shahid Iqbal complainant never appeared before the Court statedly on account of his absconsion in some other criminal case.

In the wake of information received at the police station, Muhammad Shafi, SI (PW-15), commenced investigation; he attended the dead bodies in the hospital and arranged autopsy whereafter inspected the spot; steps taken include seizure of vehicle, blood and 70 casings (P-1/1-70), besides other formal investigative steps.

Dr. Muhammad Faisal Shahzad (PW-9) conducted autopsy of Bilal deceased at 12:05 a.m. on 26-8-2010; he noted four points of entry, one with multiple apertures on left cheek, right mandible, on the back of chest and front of left upper arm; massive violence fractured facial, skull bones, right scapula accompanied by injuries to ribs, lungs and heart, resulting into immediate cardiopulmonary arrest; Ansar Iqbal, deceased was examined at 12:30 a.m; four entry wounds on the left side of chest, left back of abdomen, top of left upper arm and back of head were noted with multiple apertures on the back of abdomen; skin, soft tissues and muscles were damaged alongside 3rd and 4th rib, left pleura, lung and main heart vessels besides fracture of left scapula, resulting into immediate cardiopulmonary arrest; Riaz Khan deceased was last to be examined at 1:00 a.m; he received three fire shots on the back of left side of head, below right hypochondrium, left elbow joint. Deaths were immediate with the same interregnum between death and autopsies. Entry wounds were noted to have corresponding exits and rigor mortis fully developed in each case.

A joint investigation team comprising Sabir Hussain (PW-13) and Muhammad Amin, Inspectors took over investigation; Muhammad Fayyaz appellant, already in custody in some other criminal case, was formally arrested on 11-1-2011; a .44 caliber,

statedly recovered earlier was transposed in the present case on 23-1-2011; remainder of the accused stayed away from the law; Ejaz Hussain, Inspector (PW-14) caused issuance of their proclamations. The appellant was alone indicted before learned Special Judge Anti-Terrorism Court-I at Gujranwala on multiple counts; he claimed trial on 13-4-2011, pursuant whereto, prosecution produced as many as fifteen witnesses. Fate of the prosecution case is hinged upon ocular account furnished by Muhammad Mansha (PW-11) and Muhammad Azam (PW-12); in the absence of Shahid Iqbal, complainant, they with one voice, supported the story set up in crime report Ex.PA. On forensic side, blood secured from the vehicle was found to have been of human origin; gun (P-7), allegedly recovered from the appellant, sans forensic analysis/comparison with the casings and thus, recovery thereof remains inconsequential. The appellant confronted prosecution evidence with a detailed denial alleging past enmity and factionalism as factors behind his false implication; he pleaded alibi, as according to him, at the relevant time, he was present at Lahore in the house of Muhammad Shafi, whom he produced as DW-1 to support his claim. Unimpressed by appellant's plea, the learned Special Judge vide impugned judgment dated 20-8-2013 proceeded to convict and sentence the appellant as under:-

i. U/s 148 PPC.

Accused is sentenced to RI for one year.

ii. U/s 302(b) PPC accused is sentenced to death on three counts shall be hanged by neck till death subject to confirmation by the Hon'able Lahore High Court, Lahore. The accused shall also pay compensation to the legal heirs of the deceased persons amounting to Rs.100,000/- each u/s 5444-A, Cr.P.C. in case of non-payment of compensation shall suffer six months, S.I. each.

iii. U/s 7(a) of ATA, 1997 accused is sentenced to Death on three counts shall be hanged by neck till death subject to confirmation by the Hon'able Lahore High Court, Lahore. The accused shall also pay fine of Rs.100,000/- each, in case of non-payment of fine shall suffer six months, S.I. each.

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- iv U/s 7(d) of ATA, 1997 accused is sentenced with imprisonment for 10 years R.I. fine of Rs.50,000/- in case of non-payment of fine shall suffer three months, S.I. each.*
- iv U/s 427, 149 PPC accused is sentenced with imprisonment for 2 years R.I.*

Sentences u/s 427/149 PPC & 7 (d) of ATA, 1997, shall run concurrently. Accused/convict to this extent shall also entitle for the benefit of Section 382-B, Cr.P.C.

vires whereof are being challenged through Crl. Appeal No.1304 of 2013 accompanied by Capital Sentence Reference 21-T of 2013; bearing a common thread, these are being decided through this single judgment.

2. Learned counsel for the appellant contends that the deceased were surprised by someone's from amongst their multiple enemies in an unwitnessed occurrence and the appellant as well as the co-accused, tried subsequently, have been arrayed on account of a misplaced and misconceived suspicion; that prosecution case is so hugely exaggerated that it would be extremely perilous to convict the nominated accused, particularly in view of the admitted prosecution position that they were accompanied by three unknown assailants armed to the teeth actively participating in the crime; that there is an inordinate delay between the occurrence and postmortem examinations and thus, it can be safely concluded that First Information Report as well as the autopsy reports were not recorded at the points of time mentioned therein; that presence of the witnesses at the scene where the deceased were taken by surprise in a vehicle unanticipatedly, is far from being probable; that even otherwise, given avowed enmity between the appellant and the witnesses, in the absence of independent corroboration of their statements, hopelessly lacking; that had the witnesses, closely related with the deceased, been present at the spot, would have been an equally ideal target; that prosecution case cast a wider net

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wherein, three real brothers, namely, Muhammad Arshad, Muhammad Amjad and Muhammad Ansar along with their collaterals have been ruthlessly implicated. The bottom line is that prosecution has not been able to prove the charge beyond reasonable doubt and it would be unsafe to maintain the conviction. Contrarily, the learned Law Officer assisted by learned counsel for the complainant has supported the impugned judgment on the ground that notwithstanding absence of the complainant, the prosecution with the assistance of two eye witnesses, successfully drove home the charge beyond reasonable doubt; that occurrence, a daylight affair, in the midst of inhabited area, close by witnesses' residence, there is no occasion to suspect their testimony; that given previous strong enmity, the motive is inexorably pointed upon the appellant as well as the co-accused; that in the face of confidence inspiring ocular account, inconsequential recovery would not adversely impact upon the prosecution case. Lastly, it is argued that substitution, being a rare phenomenon, there was no occasion for the prosecution to substitute the real offenders with the innocent in a case wherein complainant's real brother in his prime youth was done to death in a brutal and wanton manner. Massive loss of life and violence have been pressed into service for confirmation of death penalty.

3. Heard. Record perused.

4. Both sides are pitted against each other with an awful past and it is so acknowledged by no other than Muhammad Mansha (PW-11) himself, as according to him, six persons of the accused side were murdered wherein members of the complainant's family, closely related with both the witnesses were hauled up as accused. There is a reference to another case wherein three persons, namely, Nazar Muhammad, Muhammad Nazeer and Muhammad Aslam were murdered registered at the instance of Amjad, co-accused; the witness goes on to admit that "*we have got registered 03/04 cases of*

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murder against all the witnesses of said case”; the witness further concedes, “*it is correct that Muhammad Arshad, Muhammad Amjad and Muhammad Ansar, since PO of this case are sons of the deceased of previous case*”. While this formidable past reinforces the motive in the context of present case, it certainly warrants, in retrospect, a very cautious and careful scrutiny of prosecution evidence and in that backdrop, the most important aspect of the prosecution case is probable/possible presence of the witnesses at the crime scene, particularly at a point of time when the assault commenced. Both the eye witnesses are *chachazad/collaterals*. The occurrence took place on a road surrounded by factories on both sides and according to the witness, he along with Shahid Iqbal and Muhammad Azam was coming to the house from ‘*Adda of sand and gravel*’; he admitted that he plied a tractor-trolley owned by him for the delivery of sand and gravel; given the time of occurrence 2:30 p.m, peak business hours, it is strange that he was accompanying the witnesses having no business to share with him; equally strange is confluence of accused/assailants and the witnesses, unanticipatedly at the venue exactly at a point of time when the assault commenced. Argument that the witnesses were subsequently staged managed merits serious consideration. According to the medical evidence, all the deceased died instantaneously while according to this witness, Bilal was taken to the hospital in injured condition leaving the dead behind, a position that lacks confirmation, as it runs counter to the opinion furnished by the medical officer, otherwise seemingly correct given the violence inflicted upon the deceased; the witness denied the suggestion that all the deceased succumbed to their injuries at the spot there and then. Seemingly, there is no reason for the witnesses to take Bilal deceased alone in injured condition, as is claimed by them, leaving behind Ansar Iqbal and Riaz Khan; injury statements and inquest reports do not support the above position; the witnesses are also reticent as to how they shifted Bilal to the hospital

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and by whom he was pronounced dead when they left his dead body there to return back to the spot wherefrom other deceased were shifted in Rescue-1122 ambulance; a normal response of the witnesses would have been to take all the deceased together to the hospital, if at all, they were there and had a means for transportation whereas the needful was done by Rescue-1122 ambulance, a circumstance suggestive of a different scenario. Sequential order in terms of time does not admit examination of the dead bodies to commence as late as 12:05 a.m. after midnight, as occurrence statedly took place at 2:30 p.m. with a direct First Information Report not later than 3:35 p.m. at the police station located just 2 ½ kilometers therefrom; it is in the statement of Muhammad Azam (PW-12) that *“The distance between the place where the road joins the G.T. road and civil hospital is about 01¼ miles. It takes 20 minutes to reach in the hospital from the place of occurrence while on a normal speed on vehicle”*. Development of rigor mortis within above time and space is mind boggling and thus, conclusion that both complaint Ex.PA as well as inquest reports were not prepared at the time, purportedly mentioned therein, would not be unrealistic. Recovery of gun P-7 being inconsequential in view of absence of forensic comparison does not advance prosecution case qua the appellant as well. Argument that substitution is a rare phenomenon and there was no earthly reason for the complainant and the witnesses to replace the real offenders with the innocent, though ingeniously articulated, nonetheless, is beside the mark; there are situations where substitution is not that a rare phenomena; these have been aptly illustrated in the case of *Muhammad Ramzan alias Boota Vs. The State* (PLD 1999 Lahore 221), advantageously reproduced below:-

“Substitution in criminal law means, replacement of real offender by another person who might be wholly unconnected with crime or might have played a role different than the one assigned to him. Substitution of the real offender by another

person is said to be a rare phenomenon. This concept is essentially based on human psychology that retributive instinct of the victim or aggrieved person would prompt him to go only for the blood of the actual perpetrator and not the innocent. The rule has no empirical foundations and the question whether there has been substitution or not, has to be determined on case to case basis because in actual practice substitution has not been found to as rare as one would have you believe. Substitution is of two kinds: Conscious, calculated and well-thought of; and the other kind is non-deliberate. Where parties are not at loggerheads prior to an incident which takes place suddenly or due to an isolated cause or motive, and the complainant party has no time to reflect on the issue and the registration of case is free from extraneous or external influences, there would be little likelihood of substitution. But where deep-rooted enmity exists between the parties and internecine feud is going on between the two for some time, the complainant party would have every desire to see the heads of the mighty roll. In such a situation, persons of the opposite camp who are more influential, more important or more dangerous, are likely to face the brunt of vendetta of the wily and scheming complainant. Considerable substitution in such situations is likely to occur. Another case scenario admitting of such a possibility is where hired assassins are employed to commit a crime. Real culprits or the mafioso are some times let off and instead actual enemies who hire the assassins are assigned the effective roles or roles played by accused are swapped. A large scale substitution is resorted to by the complainant in such cases. This phenomenon is noticeable in North Western part of the Punjab. Non-deliberate substitution on the other hand occurs where the incident is unwitnessed one or is not witnessed by the concerned people and there is no apparent motive for the incident. The accused, in such cases, is picked out or involved on suspicion, guessmark or information provided by others. Choice of the accused being suspicion-based, can be equally wrong or fallacious. The substitution or more correctly, false involvement, in such a case, might not be motivated, but nonetheless is a real possibility but surprising aspect of the matter is that the complainant party would stick with dogmatic rigidity to the ill-conceived story pieced together by it. The reason might be various or diverse, but hard fact and unpalatable reality is

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that role-swapping and substitution in criminal cases does take place. May be crime culture of the society has undergone a change or the moral fiber of society has decayed. The case in hand appears to fall in the last category of cases where substitution is result of guesswork”.

Presence of three unknown persons duly armed and having fully participated in the occurrence with no clue or traces left, additionally points upon a possibility illustrated above. As the witnesses have insisted on the presence of unknown persons and, thus, there appears no wisdom for three real brothers with their collateral to incur an avoidable risk, involving horrendous consequences. Absence of Shahid Iqbal complainant from the witness box, for whatever reason, placed the appellant in a disadvantageous position to contest his indictment, as the former, being architect of the case, had much to disclose about genesis of the case. Magnitude of loss of human lives, notwithstanding, justice must be based upon truth, the whole truth. Prosecution case is fraught with doubts, none imaginary or illusory, rather patent in the stated positions, in the face of absence of corroboration, certainly, a rule of prudence alone, it would be unsafe to maintain the conviction. Consequently, Crl. Appeal No.1304 of 2013 is allowed; impugned judgment dated 20.08.2013 is set aside; the appellant is acquitted from the charge and shall be released forthwith, if not required in any other case. **Capital Sentence Reference No.21-T of 2013** is answered in the **NEGATIVE** and death sentence is **NOT CONFIRMED**.

*(Ch. Abdul Aziz)
Judge*

*(Qazi Muhammad Amin Ahmed)
Judge*

Approved for Reporting