

Stereo HCJDA-38
Judgment Sheet

**IN THE LAHORE HIGH COURT
BAHAWALPUR BENCH BAHAWALPUR
JUDICIAL DEPARTMENT**

1. Criminal Appeal No.343 of 2015
(Ghulam Mustafa Vs. The State)

2. PSLA No.27 of 2015
(Mukhtar Ahmed Vs. The State & 10 others)

&

3. Murder Reference No.46 of 2015
(The State Vs. Ghulam Mustafa)

Date of hearing: 10.09.2018

Appellant by: M/s Hafiz Shahid Nadeem Kahloon and
Sadiq Mehmood Khurram Malik,
Advocates.

Complainant by: Syed Jamil Anwar Shah, Advocate.

State by: Mr.Asghar Ali Gill, DPG with Faisal ASI.

QAZI MUHAMMAD AMIN AHMED, J:- Ghulam Mustafa, appellant herein, is in receipt of a guilty verdict, returned by a learned Additional Sessions Judge at Liaquatpur vide impugned judgment dated 30.6.2015; he stands convicted under Section 302(b) of the Pakistan Penal Code, 1860 for committing *Qatl-e-Amd* of Allah Wadaya, 22, henceforth referred to as the deceased, during the intervening night of 6th/7th July, 2012 within the area of *Lal Shah*, situating 6-kilometers from Police Station Shedani, District Rahim Yar Khan; he is sentenced to death with compensation of Rs.200,000/- or to undergo six months simple imprisonment in the event of default; Pervez alias Billu, Muhammad Tariq, Yar Muhammad, Farooq Ahmad, Noor Muhammad, Muhammad Asghar, Muhammad Ayub, Muhammad Shahid, Ghulam Shabbir and Muhammad Yaqoob, arrayed as co-accused were acquitted from the charge.

2. Prosecution case is structured upon application dated 7-7-2012 presented by Mukhtiar Ahmad (PW-1) deceased's father to Muhammad Jamil, A.S.I (CW-7), 12:30 a.m. at the spot. According to the complainant, during the fateful night, he was asleep in his house; at about 11:00 p.m. gun reports as well as noise by his son awakened him; taking Muhammad Aslam (PW-2) and Muhammad Akhtar PW, he reached the spot to see the appellant armed with a .12 caliber double barrel gun accompanied by Farooq, Tariq Parvez alias Billu, Muhammad Yaqoob, Ghulam Shabbir, Shahid, Allah Bukhsh alias Jamsheda, Yar Muhammad, Muhammad Ayub and Haji Noor Muhammad, armed with clubs, forcibly taking the deceased towards the house of Yar Muhammad; he was being thrashed by the accused; when the complainant and Muhammad Aslam PW intervened, they too were belaboured; as they reached the main gate of Yar Muhammad's house, the appellant shot the deceased on right side of his chest followed by a shot by Allah Bukhsh landing in the pelvic region; deceased succumbed to the injuries within witnesses' view. Commotion attracted the neighbourhood to intervene. Leaving dead body at the scene, the witnesses ran into safety. Motive for the crime is murder of one Naseem Bibi wherein the complainant and the deceased were framed as accused, however, let off subsequently; deceased's suspected illicit liaison with one Parveen Bibi was an additional bone of contention; it is alleged that one from amongst the accused, namely, Allah Bukhsh also died during the occurrence. On the following day, the complainant graduated number of the accused by addition of Muhammad Asghar through a supplementary statement.

Autopsy conducted at 9:30 a.m. revealed two entry wounds with blackened margins on right side of chest with corresponding exit on right hip accompanied by multiple bruises on the body, seven in number; injuries on the chest were opined as fatal, causing death with ½ to 1 hour whereas interregnum between death and postmortem was

estimated as within 12 hours. Mukhtiar Ahmad (PW-1) and Muhammad Aslam (PW-2) were examined under a police docket at 7:30 a.m; they were noted mostly with abrasions, however, the latter sustained a lacerated wound 1 x .5 cm with a bruise.

On accused's side, Allah Bakhsh, deceased was noted with a firearm injury on right side of chest with corresponding exit; fatal in the ordinary course of nature, causing death within 30 minutes, 12 hours preceding autopsy.

Muhammad Jameel, S.I (CW-7) inspected the spot; he secured bloodstained earth as well as two casings of .12 caliber (P-1/1-2) besides taking other investigative steps of formal nature; he arrested the appellant as well as Parvez and Tariq co-accused on 5-8-2012; pursuant to disclosures, the appellant led to the recovery of gun (P-4) whereas Pervez Iqbal got recovered Repeater (P-5); remainders of the accused were exonerated. Dissatisfied with the investigation, the complainant instituted a private complaint (Ex.PB) wherein process was issued against all the accused.

The accused came up with their own story, related by Muhammad Ayub; they blamed the deceased accompanied by Muhammad Aslam, Mukhtar Ahmad, Ayyaz Ahmad and Allah Ditta for mounting assault, in the backdrop of suspected illicit liaison between the deceased and Mst. Parveen Akhtar, a common ground between both sides, in consequence whereof, Allah Bukhsh sustained fatal shot. Deceased's death was explained as outcome of exercise of right of private defence by the appellant. Police registered a separate FIR, subsequently prosecuted through a private complaint, ultimately resulting into acquittal.

Indicted by a learned Addl. Sessions Judge at Liaquatpur on 3.4.2013, the accused claimed trial, pursuant whereto, prosecution in order to bring home the charge, besides relying upon forensic reports, produced as many as ten witnesses; of them seven were examined as Court witnesses. Mukhtiar Ahmad (PW-1) and Muhammad Aslam

(PW-2) furnished ocular account, prosecution's main reliance. The accused confronted the prosecution evidence with a unanimous denial citing false implication on account of previous enmity; the bottom line is that the prosecution advanced a false case in order to hush up murder of Allah Bukhsh. In their detailed replies, the accused omitted reference to self defence; none opted to be a witness in disproof of the charge. The learned trial Judge acquitted all the accused except the appellant; convicted and sentenced as referred to above vide the impugned judgment, vires whereof, are being challenged through Crl. Appeal No.343 of 2015; PSLA No.27 of 2017 by the complainant seeks special leave for appeal against the acquitted accused; Murder Reference No.46 of 2015 by the State is aimed at confirmation of death penalty, bound by a common thread, these are being decided through this single judgment.

3. Learned counsel for the appellant contends that occurrence did not take place in the manner as alleged in the crime report and according to him, it is so evident from the homicidal death of Allah Bukhsh, appellant's cousin in front of the abodes of accused side; that prosecution story on the face of it merits outright rejection being ludicrously preposterous, as there was no occasion for the appellant and his companions to go all the way to overpower the deceased so as to bring down in front of their home instead of dealing with him and other PWs there and then on their first encounter; that evidence disbelieved qua majority of the accused albeit with different roles, nonetheless, cannot be relied upon against the appellant without independent corroboration, hopelessly lacking; that given the past enmity even otherwise, according to the learned counsel, it would be unsafe to rely upon the witnesses without strong corroboration; while referring to positive forensic report on the basis of dispatch of casings prior to appellant's arrest, it is argued that same being self-destructive, cannot advance prosecution case inasmuch as according to the prosecution itself, the appellant is

attributed single shot upon the deceased whereas second shot is assigned to Allah Bukhsh deceased and, thus, wedding of both the casings with appellant's gun carried no weight. The bottom line is that prosecution has not been able to prove its case beyond reasonable doubt and, thus, it would be unsafe to maintain the conviction. Contrarily, the learned Law Officer assisted by learned counsel for the complainant has defended the impugned judgment on the ground that given the past enmity the appellant had a strong motive to quench; a common background presented no difficulty to the witnesses to identify the culprits; that injured witnesses otherwise natural, the learned trial Court rightly believed them qua the role assigned to the appellant. According to the learned Law Officer, ocular account is fully supported by medical evidence leaving no space to entertain any hypothesis of innocence; he has prayed for confirmation of death penalty. Learned counsel for the complainant while arguing petition for special leave to appeal contends that there was no justification for the learned trial Judge to acquit the respondents from the charge after he unreservedly believed the testimony of two witnesses, found sufficient to award capital sentence to the co-accused. While referring to different roles, it is argued that without active participation of the respondents, it was not possible for the appellant to successfully carry out the assault and, thus, they were squarely placed in the community of intention being part of an unlawful assembly, consciously prosecuting a common object.

4. Heard. Record perused.

5. Relations between the appellant and the complainant are plagued for reasons more than one; the deceased alongside his father was blamed for murder of Naseem Bibi; former was also suspected for illicit liaison with Parveen Bibi, both ladies from appellant's household. Admitted distance between complainant's house and the venue is one acre as against 3/4 suggested by the defence. In this

background, deceased's forcible removal at 11:00 p.m. without his initial alarm to the family, is mind boggling to say the least. According to Mukhtar Ahmad PW when awakened, he saw the deceased for the first time, being dragged by the assailants towards the house of Yar Muhammad when he followed them alongside the witnesses; it is so stated by him, unambiguously in the First Information Report, though abandoned subsequently. In the private complaint, he described the opening part of the occurrence in a manner, diametrically incompatible with his earlier stance; he is duly confronted with his departure, in the following terms:-

"I have recorded in my statement Ex.DA that the accused were taking my son Allah Wadhaya and dragging him towards the house of Yar Muhammad and also giving him beating. Confronted with Ex.DA where it is not so recorded."

In the witness box, he asserted that:-

"on 7-7-2012 at about 11:00 p.m. I was sleeping along with my son Allah Wadhaya (since deceased), I heard hue and cry of my son Allah Wadhaya and woke up and on my hue and cry PWs Aslam and Akhtar also attracted there. I also heard aerial firing".

Positions taken by the complainant are irreconcilable and, thus, the genesis of occurrence as well as deceased's presence, according to site plan Ex.PM, inside the house of Yar Muhammad remains shrouded in a mystery; it tremors the foundations of prosecution case. Hypothesis of dragging is further nullified by the medical evidence, though there are multiple bruises, however, given their locales and measurements, these are possibly not result of dragging over a distance disputed as one to four acres, taken on either side. Site plans are silent on inter se distance. Even otherwise, prosecution case on its very outset is far from being plausible; if at all, the appellant and his comrades in crime had decided to knock down the deceased and for that they successfully reached the place where he was asleep;

seemingly there was no earthly reason for them to defer the assault by taking him all the way to the house of Yar Muhammad, in the face of resistance, particularly even after arrival of the witnesses, as suggested by the complainant; the only possible inference is other way around. Presence of a ligature mark sans explanation as well. According to inquest report Ex.PL, deceased's last belonging secured vide inventory by the Investigating Officer present a startling detail; it includes half a pack of condoms, two live cartridges of .12 caliber, a loaded magazine of .30 caliber and a cell phone handset; barring scheduled ventures, such articles are seldom kept during sleep.

Though there is a reference in the crime report about death of Allah Bukhsh during the same incident, nonetheless, without sufficient details; he does not figure anywhere in the pictorial diagram of site plan Ex.PM, comprising five points, however, the plan is expanded by graduating the points, eight in number whereby Allah Bukhsh is shown at point No.8 lying dead by a fire shot by no other than the deceased. The exercise contemplated to advance its case, on the contrary, raises the entire edifice to the ground, if Allah Wadhaya was carrying the gun all the way from his home to the venue to finally shoot Allah Bukhsh, there was hardly an occasion for the assailants to avoid retaliation before they could fatally strike the deceased. It is further contradicted by site plan with scale Ex.PV prepared on 29-11-2014 with five points, omitting conspicuously dead body of Allah Bukhsh, purportedly shown earlier on 7-7-2012. Prosecution's positions are mutually destructive. Argument that two eye witnesses, with injuries on their persons and no apparent reason to substitute the real culprit can by themselves drive home the charge notwithstanding, investigative flaws does not hold water, except for a trivial lacerated wound, few abrasions statedly suffered by them in a highly charged situation cannot rescue the charge. Injuries, even most extensive and grievous, cannot confer the title of truth upon witnesses, otherwise found inherently unreliable. On the whole,

prosecution case is fraught with doubts; the complainant abandoned case initially set up by him under his own signatures; postmortem is delayed. Homicidal death of Allah Bukhsh during the same occurrence has not been satisfactorily explained. It would be unsafe to maintain the conviction, without potential risk of errors. Consequently, by extending benefit of doubt to the appellant, **Crl. Appeal No.343 of 2015** is allowed; he is acquitted from the charge and shall be released forthwith, if not required in any other case. **Murder Reference No.46 of 2015** is answered in the **NEGATIVE** and death sentence is **NOT CONFIRMED**.

6. As a natural corollary of findings above, P.S.L.A No. 27 of 2015 is **dismissed**.

(Ch. Abdul Aziz)
Judge

(Qazi Muhammad Amin Ahmed)
Judge

Approved for Reporting