

Stereo HCJDA-38
Judgment Sheet

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

1. Criminal Appeal No.79 of 2015
(Fida Hussain Vs. The State)

2. Criminal Appeal No.128 of 2015
(Faiz Ahmad Vs. The State & 8 others)

&

3. Murder Reference No.12 of 2015
(The State Vs. Fida Hussain)

Date of hearing: 09.10.2018
Appellant by: Syed Asim Ali Bukhari, Advocate.
Complainant by: Mr. Ghazanfar Ali Khan, Advocate.
State by: Mr. Asghar Ali Gill, Deputy Prosecutor
General with Iqbal, ASI.

QAZI MUHAMMAD AMIN AHMED, J:-Mehboob Ahmad, 23/24 and Muhammad Azhar, 24, henceforth referred to as the deceased, were done to death during night between 25/26-2-2012 at 2:15 a.m. within the area of *Mouza Pir Ghar* situating 13 kilometers from Police Station Meclode Ganj District Bahawalpur; the incident is reported through application (Ex.PA), presented by Faiz Ahmad (PW-1) at the Police Station on 26-2-2012, 5:45 a.m. According to the complainant, he along with Mehboob alias Mooba, Irshad Ahmad, Muhammad Azhar, Muhammad Aslam, Abdul Rauf and Ameer Hamza went to attend an annual congregation of Peer Fazal Shah on 25-2-2012; his son Mehboob Ahmad alias Mooba and nephew Muhammad Azhar, deceased parted them to return home in Basti Joiya on foot; they left at *Ishaa* prayer time. Subsequently, the witnesses set out on a motorbike at 1:30 a.m, as they reached near a *Nullah* situating closed by the fields of Mushtaq Ahmad Sukhera at

about 2:15 a.m. they saw in the light of torches and motorbike's headlamp, Muhammad Yasin, Fida Hussain, armed with 12-caliber pistols, Muhammad Bilal with a pump action gun, Muhammad Ahmad, Muhammad Sharif, Ghulam Rasool and Allah Ditta accompanied by two unknown persons on the western bank; they had encircled both the deceased with their hands tied. Muhammad Sharif, Ghulam Rasool and Allah Ditta exhorted, whereupon Muhammad Ahmad alias Lali dealt butt blows with 30-caliber pistol on the knees of Mehboob Ahmad deceased; Muhammad Bilal Joiya made a straight fire shot on Mehboob Ahmad deceased landing on the left side of chest near neck; Fida Hussain alias Fidai targeted with his 12-caliber pistol Azhar deceased hitting his jugular vein followed by Muhammad Yasin with a 12-caliber fire shot on the left jaw of Muhammad Azhar; his second fire hit the deceased on his left shoulder. Gun reports and commotion attracted Muhammad Younas and Muhammad Sarwar PWs, passing by on a motorbike. When attended, both the deceased had succumbed to their injuries. Muhammad Ameer, Muhammad Hanif and Shah Muhammad were blamed to have instigated the crime. Muhammad Bilal accused had abducted daughter of one Allah Yar; the family extended support to the complainant and this operated as motive behind the crime.

Autopsies commenced at 10:30 a.m. following day. Muhammad Azhar deceased was noted with four lacerated firearm wounds on the upper part of right chest, shoulder, left jaw and shoulder. Injury on left shoulder accompanied by blackening and tattooing of skin; bones under the neck were found fractured and same was the case with right shoulder joint and right chest wall; right side of pleura and right lung were ruptured. Hemorrhagic shock generated by injuries on chest, right shoulder and neck was blamed as cause of death within 30 minutes, with preceding 24 hours. Mehboob Ahmad alias Mooba was found with a lacerated firearm wound on left side of upper chest, back of right shoulder accompanied by

multiple abrasions on right and left knees; anterior chest wall, pleura, left lung, pericardium and heart were ruptured/perforated. Injury on the left lung and heart was viewed as cause of immediate death within preceding 24 hours.

Spot inspection includes seizure of blood, casings of different caliber, seven in number, ropes and a motorcycle, secured vide inventories. As the investigation progressed, Muhammad Yasin, Muhammad Sharif, Muhammad Ameer and Muhammad Hanif were arrested on 23-4-2012 followed by Sajid and Muhammad Ahmad on 16-5-2012; Muhammad Hafeez, Fida Hussain, Habib-ur-Rehman and Bilal were arrested subsequently last being on 8-8-2012. Upon disclosures Sajid, Fida Hussain and Muhammad Bilal led to the recovery of 12 caliber repeater, 12- caliber shotgun and 12-caliber pump action, repeatedly. Casings of 12-caliber, as per report forensic report Ex.PW, were found wedged with the shotgun pistol, recovered at the instance of Fida Hussain appellant; blood secured from the spot was reported as of human origin. The accused were indicted on 30-1-2014 by a learned Addl. Sessions Judge at Minchanabad; they claimed trial, pursuant whereto, prosecution produced 11 witnesses besides its reliance upon forensic reports. Prosecution case is primarily structured upon ocular account furnished by Faiz Ahmad (PW-1) and Muhammad Aslam (PW-2); they with one voice reiterated prosecution case, initially set up in the crime report. The accused rallied behind a unanimous denial; they referred to multiple enmities pointing upon the deceased and other family members while blaming unknown assailants as responsible for the crime; the bottom line is that they had been implicated on the basis of an ill-conceived and misplaced suspicion on account of previous enmity. The learned trial Judge picked the appellant to convict him for homicide, however, on one count alone, with sentence of death, alongside compensation in the sum of Rs.200,000/- or to undergo six months SI in the event of default; remainder were acquitted from the charge,

vide impugned judgment dated 18-02-2015, vires whereof, are being challenged through Crl. Appeal No.79 of 2015; Crl. Appeal No.128 of 2015 by the complainant seeks reversal of acquittal whereas Murder Reference No.12 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 the deceased were done to death in an un-witnessed occurrence by their adversaries, under mysterious circumstances and that the appellant and other co-accused were arrayed on the basis of deliberations and consultations, as the family was clueless about the real offender, they selected the accused through guess-mark under a mistaken belief that they might had settled the score. The learned counsel has attempted to highlight the improbability of the whole scenario suggested in the crime report, as according to him, there was no occasion for the deceased to part ways with the other family members assembled at the shrine to attend a ritual in a cold winter night as well as arrival of the witnesses at the crime scene exactly at a point of time when the assault commenced. Acquittal of co-accused, assigned identical role, on the same set of evidence is another argument, addressed forcefully, to assail the impugned judgment. The bottom line is that prosecution has not been able to prove 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 there was no reason for a father to substitute actual offender committing murder of his son alongside his nephew; it is argued that the witnesses have satisfactorily explained their company with the deceased and their evidence cannot be excluded on reasons, speculative and conjectural in substance. While arguing appeal against acquittal, learned counsel for the complainant/appellant contends that there was no occasion for the learned Addl. Sessions

Judge to let off the respondents in the face of formidable evidence pointed on their culpability, both in terms of individual roles as well as in the backdrop of community of intention; he submits that Respondents' acquittal, based upon a view impossible likely to result into miscarriage of justice, warrants interference. The learned Law Officer as well as the counsel for the complainant unanimously prayed for confirmation of death penalty.

4. Heard. Record perused.

5. The case is founded upon written application (Ex.PA) moved by Fayyaz Ahmad (PW-1). While in the witness box, he deviated from his earlier position in terms of locales of injury; he is duly confronted with his improved version. Even if his deviation, being trivial is ignored, there are certain alarming interpolations in Ex.PA, consequences whereof, cannot be overlooked. Right bank of nullah where the accused as well as the deceased are shown to have come within witnesses' view for the first time was initially inscribed as left; words 2.15 a.m. were also seemingly inserted subsequently; locale of fire attributed to Fida Hussain on the right jugular vein is substituted with left and same goes to the injury on the right side of jaw of Muhammad Azhar deceased, changed through overwriting. These discrepancies cannot be viewed as innocuous or result of inaptitude when taken into consideration alongside delayed autopsies. The witness had admitted that someone drafted Ex.PA on his behalf and it was read over to him before he signed it in token of its correctness. On the contrary, it admits space to entertain the hypothesis of rectification after receipt of findings by the Medical Officer.

Seemingly there appears no reason as to why both the deceased would prefer to undertake return journey on their own, that too, without any means, in a chilled winter night, leaving majority of the entourage behind. In the absence of satisfactory explanation, none offered, it sounds most improbable. No less mind boggling is arrival

of the PWs at the crime scene exactly at a point of time when the accused commenced assault. It is complainant's own case that the deceased left at *Ishaa* prayer time, to be safely reckoned in the month of February at 7/7:30 p.m. Arrival of witnesses at 2:15 a.m. leaves interregnum of almost seven hours, a time span sufficient to cover at least 35 k.m. with a speed of five kilometer per hour; in their uninterrupted journey, the deceased must have gone past much earlier, as according to the complainant, distance between his house and *Mouza Pir Garh Chishti* is 5/6 kilometers. Taking the complainant at his words, the only possible inference is that the deceased were subdued by the assailants much earlier than arrival of the PWs and, thus, seemingly for them there was no occasion to hold the assault in abeyance till arrival of the witnesses. Prosecution is relying upon a coincidence, that seldom occurs.

Source of light is yet another dilemma confronting the prosecution. The assailants were identified in the light of motorbike's headlamp as well as torch, none taken into possession and, thus, it would be difficult to draw an inference favouring the prosecution. Even the stated sources given the number of accused and roles extensively assigned to them would be less than sufficient to rule out possibility of error in a sudden unanticipated extreme crisis situation. On the contrary, Investigating Officer secured a motorbike lying at the venue, seemingly a possible means to bring the deceased at the crime scene, another possibility incompatible with the case set up in the crime report. It would be unsafe to saddle the appellant with fatal shot on a suspect possibility of his having been identified beyond error, more so in the face of rejection of prosecution evidence qua the accused assigned effective/fatal roles. Similarly, it is an admitted position that no case was ever registered against Bilal accused for abduction of Allah Yar's daughter, an incident seldom acquiesced. Alleged motive, though certainly not a constituent of the crime, nonetheless, is not extending structural strength to the charge.

Acquittal of co-accused based upon a possible view would certainly warrant an independent corroboration before the witnesses are believed qua the appellant; it is not forthcoming as neither the motive nor recovery of forensic evidence would suffice in circumstances. Positive forensic report cannot be viewed as corroborative in isolation with negative findings on account of prosecution's failure to submit weapons used by the co-accused, additionally for the reason that compatibility of four casings with appellant's weapon statedly used for single shot is mutually destructive with the position taken in the crime report; discrepancy is irreconcilable.

Yet another most startling aspect of the case is semi naked postures of the dead bodies when attended by the Investigating Officer. It is admitted by Faiz Ahmad (PW-1) as under:-

“When police arrived at the spot I was accompanied with the police, at that time the “Shalwar” of Azhar was not present on his body and string was also absent as well as “Shalwar” of Mehboob deceased was divided into two pieces and it was not sworn by Mehboob deceased at that time. It is correct that I have not mentioned the factum of nakedness of both deceased from their lower part of bodies in my application Ex.PA.”

The admission completely vitiates the possibility of witnesses' presence at the relevant time, otherwise, they would not have omitted circumstances behind denudation of the deceased before they were done to death. Even after the occurrence, the witnesses did not attempt to cover the bodies and this in retrospect, spells out a scenario altogether different. What exactly befell upon the deceased is left to imagination. On an overall analysis, prosecution case is found fraught with doubts, structured upon its stated positions and, thus, it would be perilous to maintain the conviction. Consequently, by extending benefit of doubt to the appellant, **Crl. Appeal No.79 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.12 of 2015** is answered in the **NEGATIVE** and death sentence is **NOT CONFIRMED.**

As a natural corollary to the findings above, Crl. Appeal No.128 of 2015 stands **dismissed.**

(Raja Shahid Mehmood Abbasi) (Qazi Muhammad Amin Ahmed)
Judge **Judge**

Approved for Reporting