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Judgment Sheet

IN THE LAHORE HIGH COURT MULTAN BENCH, MULTAN

(JUDICIAL DEPARTMENT)

Criminal Appeal No.703-J of 2009

Muhammad Yousaf etc. versus The State etc.

Criminal Revision No.116 of 2009

Bashir Ahmad versus The State etc.

Date of hearing	**28.02.2018**
The Appellants on bail by	Mr. Badar Raza Gilani Advocate
The Complainant by	Miss. Asma Khan, Advocate
The State by	Mr. Iftikhar-ul-Haq, Addl. Prosecutor General.

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Asjad Javaid Ghural, J. Through Criminal Appeal No.703-J of 2009 under Section 410 Cr.P.C., appellants Muhammad Yousaf, Zakriya, Muhammad Younas and Muhammad Javed have challenged the vires of judgment dated 29.01.2009 passed by a learned Additional Sessions Judge at Burewala in case FIR No.118 dated 08.08.2005, in respect of offences under Sections 302, 148 & 149 PPC, registered at Police Station, Fateh Shah, Burewala District Vehari whereby they were convicted and sentenced as under:-

> "**Under Section 302(b) PPC**
>
> Imprisonment for life each and to pay the compensation of Rs.50,000/- each to the legal heirs of deceased Farooq Ahmad and in default thereof, to further undergo simple imprisonment for six months each.

They were held entitled to the benefit of Section 382-B Cr.P.C.

2. Criminal Revision No.116 of 2009 filed by complainant Bashir Ahmad seeking enhancement of sentence of respondents No.2 to 5/appellants shall be decided through this common judgment.

3. The prosecution story unfolded in the crime report (Ex.PA/1), which was registered on 08.08.2005 on the written complaint (Ex.PA) of Bashir Ahmad (PW-1), is that on 06.08.2005 at 3/4:00 p.m. he was present in his

house when one Jamal Din, a member of brotheri, had come and insisted to accompany him to Chak No.327/E.B. for the settlement of his dispute with the in-laws. The complainant alongwith his sons Farooq and Abdul Latif and Jamal Din had gone to Chak No.327/EB where both the rival parties had to gather in the Haveli of one Rafique Ahmad. The complainant alongwith his son Abdul Latif sat in the house of Rafique Ahmad whereas his son Farooq Ahmad and one Safdar Ali, had gone to the Haveli of Rafique Ahmad. They heard hue and cry from the Haveli, came out in the street and saw Muhammad Yousaf (appellant) armed with hatchet, Muhammad Zakriya (appellant) armed with hatchet, Abdul Haq, Muhammad Younas (appellant) and Muhammad Javed (appellant) armed with a clubs alongwith two unknown accused, who could be identified when come across, had entered in the Haveli of Rafique Ahmad. Muhammad Yousaf raised a Lalkara to teach a lesson to Farooq Ahmad for coming to their village and gave hatchet blow at the right side of head, Muhammad Zakriya gave hatchet blow at the right side of head, Muhammad Javed gave club blow near the nose, Muhammad Javed gave club blow near the eye of Farooq Ahmad, who fell down. Muhammad Zakriya and Muhammad Yousaf have given repeated hatchet blows at laying Farooq Ahmad on different parts of the head of Farooq Ahmad. Two unknown accused persons raised a Lalkara to give the same treatment whosoever comes forward. On raising hue and cry of Safdar, the people of the vicinity gathered at the spot and on seeing them, the accused persons fled away alongwith their respective weapons. They attended Farooq Ahmad and shifted him to hospital at Burewala from where he was referred to Nishtar Hospital, Multan. Motive behind the occurrence was their longstanding murderous enmity with the accused party.

Farooq Ahmed expired at Nishtar Hospital, Lahore on 05.09.2005 at 1:25 a.m. whereupon offence under Section 302 PPC was added.

4. Nisar Ahmad, SI (PW-8) had drafted the complaint (Ex.PA) of complainant Bahsir Ahmed on 08.08.2005, which was dispatched to the police station for the registration of case. He reached at the place of occurrence, prepared site plan without scales (Ex.PM) and recorded the statements of witnesses under Section 161 Cr.P.C. Thereafter, the investigation was entrusted to Waris Ali, SI, who had been martyred before recording his

statement. Nasir Ahmad, SI had given secondary evidence and verified the signature and handwriting of said Waris Ali, SI on the documents prepared by him during investigation. During investigation, appellants Muhammad Yousaf led to the recovery of hatchet (P-2) from Zakaria hatchet (P-3), Muhammad Younas Sota (P-4), Muhammad Ashraf Toki (P-5) and Muhammad Arshad *Danda* (P-6), which were taken into possession vide recovery memos Ex.PC to Ex.PG respectively. After the completion of investigation, the Station House Officer prepared challan and submitted the same before the learned trial court.

5. Dr. Rao Iftikhar Ahmad (PW-7) had conducted medico legal examination of deceased Farooq Ahmed, in injured condition, on 06.08.2005 and observed the following injuries:-

> "1. A lacerated wound 4 cm x 0.5 cm x bone exposed on middle of forehead.
> 2. A Y shaped lacerated wound measuring 3 cm x 0.3 cm into bone exposed on front of head near hair margins.
> 3. A lacerated wound measuring 2 cm x 0.2 cm x scalp deep on left side of head.
> 4. A lacerated wound measuring 4 cm x 0.5 cm x bone exposed on back of right side of head.
> 5. A lacerated wound measuring 3.5 cm x 0.3 cm x bone exposed closed to injury No.4.
> 6. An incised wound 0.5 x 0.2 cm x skin deep on the bridge of nose.
> 7. An incised wound 1 cm x 0.3 cm x skin deep below the right eye.

The patient was in shock and unconscious condition. After emergency treatment, he was referred to Nishtar Hospital.

He had conducted post mortem examination on the dead body of deceased Farooq Ahmed on 06.09.2005 at 9:30 a.m. and observed nine injuries including aforesaid seven injuries, one bed sore wound and an infaracted area. The cause of death was head injuries from injury No.1 to 9 resulting in brain compression and trauma. All injuries were ante-mortem. The probable duration between injuries and death was one month whereas between death and post mortem 24 to 26-hours.

6. At the commencement of trial, the prosecution had produced 10-witnesses. The appellants and their co-accused Muhammad Arshad and Muhammad Ashraf, in their statements recorded under Section 342 Cr.P.C.,

had denied and controverted all the allegations of fact levelled against them, they neither opted to make statement under Section 340(2) Cr.P.C. on oath nor had they produced any witness in their defence.

7. Learned trial Court, upon conclusion of the trial, had convicted and sentenced the appellants supra whereas acquitted co-accused Muhammad Ashraf and Muhammad Arshad. Hence, this criminal appeal as well as the connected revision petition.

8. Learned counsel for the appellants submits that the appellants are quite innocent having nothing to do with the alleged occurrence; that the mode and manner of the occurrence as narrated in the crime report are quite different to that of the actual facts of the case; that there was delay of two days in reporting the matter to the police, which shows that either the eye witnesses were not present at the place of occurrence or the crime report was got lodged with due deliberation and consultation; that the complainant party had gone to the accused and invited trouble for themselves; that the deceased had died after bout one month of the alleged occurrence in the hospital but no statement of the deceased, while in injured condition, was recorded; that neither the investigating officer nor the complainant had tried to get record the statement of the deceased in the interregnum; that the claimed eye witnesses had made material improvements in their deposition before the learned trial court and changed the role of the appellants and their acquitted co-accused; that the number of injuries mentioned in the post mortem examination report do not tally with the injuries as ascribed by the eye witnesses in their deposition before the learned trial court; that the unnatural conduct of the eye witnesses for not trying to rescue the deceased speaks volume with regard to the mode and manner of the occurrence; that the prosecution has withheld two material witnesses i.e. Jamal Din, who had convened the Panchayat and Muhammad Rafique, where the Panchayat was to be convened, which shows that they were not ready to make false statement against the appellants; that the ocular account is in contradiction with the medical evidence; that the recovery of weapons of offence i.e. Danda as well as hatchets from the appellants remained inconsequential as the same were not stained with blood; that the appellants had been implicated in this case due to their longstanding murderous animosity with the complainant party; that no iota of evidence is

available on record to connect the appellants with the murder in issue. Finally, a prayer for the acquittal of the appellants has been made.

9. Conversely, learned Additional Prosecutor General appearing for the State assisted by learned counsel for the complainant has argued in vehemence that it was a day-light occurrence, where the identity of the appellants could not be questioned; that after sustaining injuries, the deceased was provided first-aid and then medical treatment in Nishtar Hospital, Multan, which was the only reason of delay in reporting the matter to the police because to save the life of the deceased was more precious than to rush towards the police station for the registration of case; that the eye witnesses had made inter-se consistent statements explaining the injuries, the names of the accused persons and the role played by them during the occurrence; that the medical evidence is in line with the ocular account that the recovery of weapon of offence provide further corroboration to the ocular account; that the motive behind the occurrence was proved rather admitted by the defence; that the complainant being real father of the deceased would be the last person to falsely implicate the appellants in this case while letting-off the real culprits; that the evidence available on record has been well appraised by the learned trial Court, which does not warrant any interference by this Court.

10. I have heard learned counsel for the appellants, learned Additional Prosecutor General appearing for the State assisted by learned counsel for the complainant and have perused the record with their able assistance.

11. This unfortunate incident had taken place on 06.08.2005 at 3/4:00 p.m. whereas the matter was reported to the police on 08.08.2005 at 3:30 p.m. with an inordinate delay of two days and absolutely no plausible explanation could be brought on record for such delay. This fact alone by itself indicates that the story mentioned in the crime report was an afterthought one and the case was registered with due consultation, deliberation and fabrication and, thus, casts serious doubt in the veracity of the prosecution. Reliance may be placed on case titled "*Mehmood Ahmed and three others versus The State and another"* ***(1995 SCMR 127)***. This view has further been fortified in case titled "*NAZEER AHMAD versus GEHNE KHAN and others"* ***(2011 SCMR 1473)***.

12. The mainstay of the prosecution was based the testimony of Bashir Ahmad (PW-1), complainant/father of deceased Farooq Ahmad, Safdar Ali

(PW-2), a nephew of the complainant and one Abdul Latif (PW-3), brother of the deceased. All the aforesaid witnesses were closely related to the deceased and they were not resident of 327/ED, the place of occurrence. All the aforesaid claimed eye witnesses claimed to have visited the place of occurrence alongwith the deceased in order to attend a Panchayat convened by one Jamal Din due to his differences with his in-laws at the house of Rafique Ahmad. The claimed presence of the said witnesses at the venue of occurrence could not be established through any other independent source of evidence. The prosecution has withheld aforesaid Jamal Din and Muhammad Rafique, who were the best witnesses to prove the presence of eye witnesses at the venue of occurrence. The non-production/withholding of said material witnesses by the prosecution draws quite possible inference under Article 129(g) of Qanoon-e-Shahadat Order, 1984 that "*had they been produced before the learned trial court, they would have not support the prosecution version*". Furthermore, none of the claimed eye witnesses had intervened to rescue the deceased and had not received any injury during the occurrence especially when none of the accused persons was armed with any fire arm weapon, which could have scared the witnesses away. In such circumstances, the presence of both the claimed eye witnesses at the venue of occurrence, at the relevant time, is not free from doubt especially when the deceased, the complainant and the eye witnesses remained silent for about 02-days in reporting the matter to the police. I seek guidance from case titled "LIAQAT ALI versus THE STATE" **(2008 SCMR 95)** wherein it has been held as under:-

> "Having heard learned counsel for the parties and having gone through the evidence on record, we note that although P.W.7 who is first cousin and brother-in-law of Fazil deceased claims to have seen the occurrence from a distance of 30 ft. (as given in cross-examination) and two other witnesses namely Musa and Ranjha were also attracted to the spot but none rescued Fazil deceased and appellant had a free hand to inflict as many as 9 injuries on his person. The explanation given by these witnesses that since Liaqat Ali had threatened them therefore, they could not go near Fazil deceased to rescue him is repellant to common sense as Liaquat Ali was not armed with a fire-arm which could have scared the

> witnesses away. He was a single alleged assailant and if the witnesses were there at the spot they could have easily overpowered him. This makes their presence at the spot doubtful."

The settled principle by now is that once the presence of a chance witness is found to be doubtful, the same is sufficient to discard the testimony as a whole. Reliance is placed on case titled "Mst. RUKHSANA BEGUM and others versus SAJJAD and others" **(2017 SCMR 596)**, wherein it has been held as under:-

> "A single doubt reasonably showing that a witness/witnesses' presence on the crime spot was doubtful when a tragedy takes place would be sufficient to discard his/their testimony as a whole. This principle may be pressed into service in cases such witness/witnesses are seriously inimical or appears to be a chance witness because judicial mind would remain disturbed about the truthfulness of the testimony of such witnesses provided in a murder case, is a fundamental principle of our criminal justice system."

13. The complainant as well as the eye witnesses while appearing in the dock in the courtroom had deposed somewhat different to that of the story narrated by him before the police at the time of registration of the crime report. Earlier he had stated that appellant Muhammad Yousaf had given a hatchet blow at the right side of head, Muhammad Zakriya gave hatchet blow at left side of head and appellant Javed inflicted a Sota blow near the nose of deceased Muhammad Farooq whereas no role was assigned to appellant Muhammad Younas and two unknow accused persons were shown to be present at the venue of occurrence but no overt act for causing injuries to the deceased was attributed to them but surprisingly, while making their statements before the learned trial court, he named two unknown accused persons as Muhammad Arshad and Muhammad Ashraf. Muhammad Arshad was saddled with the responsibility of giving Sota blow at the head and Muhammad Ashraf was attributed the role of giving Toki blow on the back of head of deceased Farooq Ahmad. Appellant Muhammad Younas, who had earlier not attributed any injury to the deceased or the witnesses, was alleged to have given Sota blow near the eye of the deceased, which was earlier attributed to appellant Javed. Appellants Zakriya, Ashraf (since acquitted) and Yousaf while armed with hatchets, were given the main role of causing

head injuries to the deceased. They had further been saddled with the responsibility of giving successive hatchet blows whereas appellants Javed, Younas and Arshad (since acquitted) had given successive Sota blows on different parts of the body of the deceased when he was laying on the ground in injured condition. Dr. Rao Iftikhar Ahmed (PW-7) had observed seven injuries on the person of the deceased and out of them, injuries No.3, 5 & 7 were found superficial in nature, which could have been caused by falling on some hard surface. The eye witnesses had made material improvements in their deposition before the learned trial court due to which the entire prosecution story and scenario has been changed and the role of each individual accused has been intermingled.

Another important factor, which cast a thick shadow of doubt over the claim of all the eye witnesses alleging that one sharp edged injury at the head and two injuries with blunt object had specifically been attributed whereas a large number of injuries by six accused persons had been inflicted through sharp edged as well as blunt object but the medical evidence is contrary to that of the ocular version. As per medico-legal report (Ex.PJ) of the deceased conducted by Dr. Rao Iftikhar Ahmed (PW-7) when he was in injured condition, there were seven injuries on his person consisting of two incised caused by sharp-edged weapon and five lacerated wounds caused by some blunt object. If the prosecution version is taken to be true then one injury at the backside of head was attributed to Ashraf having been caused with Toki and the remaining only sharp-edged injury was attributed to appellants Yousaf, Zakriya and Ashraf (since acquitted). Same was the position with regard to the injuries caused by blunt object. The eye witnesses had tried their level best to implicate the maximum number of accused persons and had given the role of causing sever injuries to the deceased whereas the injuries actually sustained by him are not coincide with the ocular account as ascribed by the prosecution. During cross-examination, the claimed eye witnesses could not sustain their veracity on each and every aspect of the case, they were confronted with their previous statements Ex.DA & Ex.DB and at most of the times, they disowned their previous version recorded before the police stating that they had not got recorded in their statements what exactly written therein. I am of the considered view that either the claimed eye witnesses were not

present at the place of occurrence or they were intentionally suppressing some real facts for the reasons best known to them.

14. The acquitted co-accused Muhammad Arshad and Muhammad Ashraf were not named in the crime report, who were figured subsequently but they were specifically attributed the role of causing head injuries with their respective weapons i.e. Sota and Toki respectively but the same has not been believed by the learned trial Court and in consequence thereof, they had been acquitted of the charge. At present no appeal against acquittal of aforesaid co-accused has been preferred either by the State or the complainant, which shows their satisfaction over their innocence and non-involvement in this occurrence. The role of acquitted co-accused is quite identical to that of the appellants and if the testimony of the claimed eye witnesses is not taken into consideration or accepted to be a true account to their extent, then how could it be believed to the extent of the appellants, who are facing the charge of an offence entailing the capital sentence. When the co-accused, having identical role, had been acquitted of the charge on the same set of witnesses by disbelieving the prosecution evidence to their extent, the same cannot be relied upon to the extent of remaining accused persons, in absence of any independent corroboration. A reference may be made to a case titled "SHAHBAZ versus The STATE" **(2016 SCMR 1763)**. The relevant dictum is reproduced for ready reference:-

> "The law is settled by now that if some eye-witnesses are disbelieved against some accused persons attributed effective roles then the same eye-witnesses cannot be relied upon to the extent of the other accused persons in the absence of any independent corroboration."

15. Dr. Rao Iftikhar Ahmed (PW-7) had conducted medico-legal examination of the deceased, while in injured condition, on 06.08.2005 at 7:30 p.m. and observed seven injuries including five lacerated and two incised wounds on left, right and back of head and on the bridge of the nose. I have observed that the occurrence had taken place at 3/4:00 p.m. but the injured was taken to hospital after about 3/4 hours, which could only be possible when the injured remains unattended during the said period, otherwise it was quite possible for the witnesses to shift him to hospital well in the short span of time. Moreover, the said medical officer had deposed that the police arrived

in the hospital after about half an hour of arrival of the injured but on the other hand, the investigating officer had stated that the complainant brought medico legal report, presented the same to him at Adda Kabirwala, he recorded his statement and sent the complaint (Ex.PA) to the police station for the registration of case. Despite the availability of the police in the hospital, no crime report was got lodged by the complainant and the only inference could be drawn that the complainant party remained assessing and maneuvering the story and consumed time for managing the eye witnesses for the purpose of false implication of the appellants and their co-accused.

16. Farooq Ahmed deceased expired on 05.09.2005 in Nishtar Hospital, Multan and his post mortem examination was conducted on 06.09.2005 by the aforementioned medical officer and noted the aforementioned injuries. The cause of death was due to head injuries resulting in brain compression and trauma. The duration between injuries and death was one month whereas between death and post mortem examination 24 to 26 hours. The number and nature of the injuries do not coincide with the ocular version as discussed above and, thus, the medical evidence lends no support to the ocular account.

17. The motive, which led to the present tragedy was stated to be a blood feud. This fact has been admitted by the accused persons in their statements recorded under Section 342 Cr.P.C. stating that they had murderous enmity since year, 1986. The motive behind the occurrence is though admitted one yet the same being double-edged weapons, alone is not sufficient to maintain the conviction, in absence of confidence inspiring ocular account and corroboration from other independent source of evidence, which might have been the cause of murder in issue or at the same time false implication of the appellants.

18. The recovery of Dandas and hatchets is shown to have been effected at the disclosure and pointation of the appellant but the same being neither stained with blood nor tainted and having common pattern, cannot be safely connected against the appellants with any degree of certainty especially when no report of Punjab Forensic Science Agency is available on the record.

19. Having scanned the entire prosecution evidence, a conclusion is inescapable that the prosecution has failed to prove its case against the appellants beyond reasonable shadow of doubt. The claimed eye witnesses

had appeared and adduced the evidence, which could not qualify to be a true account as they had improved their version and changed the entire prosecution story with regard to the number and nature of the injuries sustained by the deceased, names and roles played by the appellants during the occurrence. The role of the appellants was intermingled and most of the injuries specifically attributed to the appellants were non-existent. Two of the co-accused having exactly identical role rather more grievous role have already been acquitted of the charge and no appeal against their acquittal has been filed by the prosecution, which shows the complainant's satisfaction qua their innocence and at the same time indicates the real possibility of their being falsehood. The medical evidence lends no support to the ocular account. The recovery of weapons of offence has not been found consequential being not stained with blood and of common pattern. So far as the admitted motive of longstanding murderous enmity between the parties is concerned, the same alone being corroboratory and double-edged weapon, is not sufficient to maintain conviction of the appellants, without having been corroborated from any other independent source of the evidence. I am of the considered view that there is no iota of the evidence with the prosecution to connect the appellants with the murder in issue. The prosecution has failed to substantiate the charge against the appellants beyond shadow of reasonable doubt and the accused would always be entitled to the benefit of doubt as a matter of right and not grace. A reference may be placed to case titled "Tariq Pervaiz versus The State" **(1995 SCMR 1345)** and also case titled "MUHAMMAD AKRAM versus THE STATE" **(2009 SCMR 230)** wherein at page No.236, it has been held as under:-

> *"It is an axiomatic principle of law that in case of doubt, the benefit of thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervaiz v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."*

20. For what has been discussed above, this appeal is ***allowed***, the conviction and sentence of appellants Muhammad Yousaf, Zakriya,

Muhammad Younas and Muhammad Javed are set aside and they are acquitted of the charge by extending the benefit of doubt to them. They are present on bail, their bail bonds as well as the sureties stand discharged from the liability.

21. For the reasons recorded hereinabove, Criminal Revision No.116 of 2009 filed by complainant Bashir Ahmad seeking enhancement of sentence of respondents No.2 to 5, is without any merits, the same stands ***dismissed in limine***.

(Asjad Javaid Ghural)
Judge

Approved for Reporting.

JUDGE

*Asif**