JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT
ISLAMABAD

CASE NO. : JAIL APPEAL NO.59-2015

Toor Khan

Vs.

The State

CASE NO. : MURDER REFERENCE NO.06-2015

The State

Vs.

Toor Khan

Appellant by : Mr. Jan Muhammad Khan, Advocate
Respondents by : Mr. Ehtisham Aslam Khan, Advocate
Mr. Majid Rasheed Khan, State Counsel
Date of hearing : 08.06.2021

AAMER FAROOQ J. Toor Khan (the appellant) was indicted for offence under section 302/34 PPC in case FIR No.396 dated 15.09.2008 lodged at P.S. Shahzad Town, Islamabad; he was convicted and awarded capital punishment for causing death of Barkat Hussain and in the case of Rafique Khan, he was awarded life imprisonment along with fine/penalty vide judgment dated 24.03.2015 passed by learned Additional Sessions Judge, Islamabad-East.

2. The gist of prosecution's case, against the appellant, is that on the complaint of one Muhammad Latif, FIR in question was registered, wherein it was alleged that on 15.09.2008, at about 6:30 p.m., appellant along with others, murdered Barkat and Rafique Khan by firing at them with 12-bore repeater. Barkat Hussain died on the spot, whereas Rafique Khan was taken to hospital and he died after 12/13 days of the incident.

3. Learned counsel for the appellant *inter alia* contended that there are material contradictions in the ocular account inasmuch as Muhammad Latif (PW-9) stated that he, along with others, was standing close to Street

No.16, whereas Azmat Ali (PW-8) stated that they were standing at the corner of Street No.16; that PW-9 stated that all witnesses proceeded towards Street No.16, whereas Azmat Ali has stated that he and Barkat proceeded towards the house where noise was coming; that PW-9 stated that fire made by Toor Khan landed on the right arm of Rafique Khan, whereas Azmat Ali stated that it landed on the left arm; both the witnesses also contradicted each other with respect to manner of firing inasmuch as Azmat Ali stated that fires were made without intervals, whereas PW-9 stated that there was an interval of about 2 to 3 minutes. Learned counsel further contended that Azmat Ali is allegedly the eye witness, however, he recorded his statement on 17.09.2008, whereas incident is of 15.09.2008 and where such is the case, the same casts doubt on the veracity of eyewitness. Reliance was placed on case reported as 'Muhammad Asif Vs. The State' (2017 SCMR 486). Learned counsel further added that as per ocular account, one fire was made by Toor Khan on Barkat, whereas according to the post-mortem report as well as testimony of Dr. Muhammad Farrukh Kamal (PW-6), he received injuries on the chest as well as both the arms, which were not possible with the single shot. He also argued that both the eyewitnesses stated that two fires were shot at Rafique Khan, whereas he received pellet injury on chest, however, on the forearm and hand, there were lacerated wounds and same could not have been due to gun shot. Learned counsel emphasized that postmortem of Rafique Khan was not got conducted, as after surgery, he was recovering well and died after 10/12 days of the incident; that last worn clothes were given by Azmat Ali (PW-8), who is the son of Rafique Khan to the police

much after the death of the deceased, which is in violation of the police rules as well as dictum of the Hon'ble Supreme Court of Pakistan in case reported as 'Muhammad Rafique alias Feeqa Vs. The State' (2019 SCMR 1068). Learned counsel further argued that under the forensic analysis, the empties recovered, matched with the weapon allegedly recovered from the residence of Toor Khan but said recovery is doubtful inasmuch as the witness of recovery namely Sajjad Ali Khan testified that he did not accompany Toor Khan inside the house from where recovery was made as per prosecution story. It was contended that recovery witness submitted that appellant opened the house and went inside however was unable to answer that from where he did get the keys of the house, as he was in police custody. Learned counsel further contended that in fact the case, against the appellant, is one of no evidence inasmuch as the ocular account is not creditworthy hence unbelievable. It was contended that forensic matching is mere corroborative and even recovery is doubtful, which has no significance, especially where, ocular account is doubtful. Reliance was placed on cases reported as 'Lal Sher Vs. The State and Another' (2021 P Cr. LJ 93), 'Muhammad Usman and another Vs. The State and others' (2020 P. Cr.LJ 1048) and 'Gul Muhammad and another Vs. The State through Prosecutor General Balochistan' (2021 SCMR 381).

4. Learned counsel for the complainant along with learned State Counsel *inter alia* contended that prosecution has proved its case beyond reasonable doubt inasmuch as weapon, recovered from the house of the appellant and the empties recovered from the scene of crime, both matched. It was further submitted that ocular account given by Azmat Ali

and Muhammad Latif withstood the test of cross-examination and is coherent and minor discrepancies, if any, are in the natural course of events. It was also added that postmortem of Barkat Hussain shows that he died due to rupture of both lungs because of gun fire made by the appellant; that though no postmortem was conducted of Rafique Khan however evidence of Lady Dr. Shazia Nazir (PW-1) and the emergency report exhibited clearly show that Rafique Khan was admitted to hospital; he had large lacerated wound muscle deep, bone exposed on left forearm, multiple pellet injuries on epigastrium and crush injury of left hand bone exposed. Reliance was placed on cases reported as 'The State through P.G. Sindh and others Vs. Ahmed Omar Sheikh and others' (2021 SCMR 873), 'Sahib Khan Vs. The State' (2008 SCMR 1049), 'Muhammad Arshad Vs. The State' (2015 SCMR 258) and 'Muhammad Hanif Vs. The State' (PLD 1993 Supreme Court 895).

5. Arguments advanced by learned counsel for the parties have been heard and the record examined with their able assistance.

6. As noted above, the appellant faced trial for causing death of Barkat Hussain and Rafique Khan. In this behalf, the prosecution, in order to prove its case, relied on evidence of Azmat Ali and Muhammad Latif as eyewitnesses (PW-8 & PW-9). The medical evidence was tendered through Lady Dr. Shazia Nazir and Dr. Muhammad Farrukh Kamal (PW-1 & PW-6). The recovery evidence of weapon of offence was tendered by Sajjad Ali Khan along with evidence of police officials, who were involved in the investigation of the case. The documentary evidence was also tendered on behalf of prosecution. FIR was tendered as Ex.PC, Injuries

Map (Ex-PA), Medical report of Abdul Rafiq (Ex-PB), Postmortem report of Barkat Hussain (Ex-PD), Inquest report of Barkat Hussain (Ex-PE), Memo of possession of empties (Ex-PG), Memo of possession of gun (Ex-PH) and Scaled site plan (Ex-PJ/1-4).

7. Generally in criminal cases, except involving white collar crimes, the ocular account is of utmost importance and takes precedence over any other form of evidence like medical etc., which only corroborates the eye witnesses. In the instant case, Azmat Ali (PW-8), who is also the son of deceased Rafique Khan, tendered evidence narrating the incident. It is pertinent to observe that incident is of 15.09.2008, whereas Azmat Ali recorded his statement with the police officials on 17.09.2008. There is no justification or basis for delay in recording the statement with the police. The effect of delay, in such a case, was discussed by the Hon'ble Supreme Court of Pakistan in case reported as 'Muhammad Asif Vs. The State' (2017 SCMR 486) and it was observed that unexplained delay, even of one or two days, in recording the statement of eye witnesses, would be fatal and testimony of such witnesses, could not safely be relied upon.

8. The gist of evidence tendered by PW-8 is that Azmat Ali, along with others including Barkat Hussain, were standing on the corner of Street No.16 when they heard noise; him and Barkat came towards the house in front whereof, scuffle was allegedly taking place; Toor Khan fired, which hit Rafique on the left arm and he again fired hitting his father's chest; the distance between Barkat from Rafique was 3-feet and inter se distance between Toor Khan and Barkat was 10/12 feet; that there was no gap between the fires made at Rafique; that appellant fired on Rafique from a

distance of 5/6 feet; that when Barkat and Azmat reached close to the place where scuffle was taking place, the appellant along with his co-accused, was actually involved in the scuffle. These highlighted issues of the evidence of Azmat Ali, when are compared with evidence of Muhammad Latif (PW-9), there are some material contradictions in the same inasmuch as Muhammad Latif stated that him and Azmat, along with others, were standing close to Street No.16; that all the persons proceeded towards Street No.16; that fire made by the appellant landed on the right arm of Rafique; that there was distance of 50 to 55 feet between Toor Khan and Barkat; that there was a distance of 20/25 feet between Barkat and Rafique; that there was an interval of 2/3 minutes between fires shot on Rafique Khan. The above contradictions cannot be termed as minor and are material in nature, especially when also examined on the touchstone of the corroborative evidence like medical opinion and the site plan. Both the witnesses have testified that appellant, along with co-accused, was allegedly involved in the scuffle with Rafique Khan, whereas both have stated that when the shots were fired at Rafique Khan, they were made from a distance; that both witnesses differed in the length/distance; none of the witnesses has stated that Toor Khan backed or moved at a distance to make fire. Likewise, Azmat Ali has stated that all the persons, named in the FIR, were standing at the corner of Street No.16, whereas Muhammad Latif (complainant) had stated that they were close to Street No.16. None of the other persons, named in the FIR, who were standing with Barkat and Azmat other than Muhammad Latif, made any statement before the court or has been shown as eye witness.

Moreover, Azmat Ali categorically stood solid with Muhammad Latif that both rushed towards the place from where the noise was coming and were side by side and stopped when they reached near the place where scuffle was taking place, however, site plan of the scene of crime does not support this evidence inasmuch as in the referred site plan, which was tendered in evidence as Ex.PJ/1-3 through Bashir Ahmed (PW-11), point-1 is the place where Barkat Hussain was standing when he was shot at, whereas point-5 is the place where Azmat Ali and other eye witnesses were standing. The two points are at a distance of about 34-feet as per site plan, however, ocular account does not narrate so. Under the site plan, point-3 is the point from where Toor Khan shot at Barkat Hussain and Rafique Khan, which is at some distance from both the deceased persons, however, ocular account states that there was active scuffle when eye witnesses reached the spot and none of the witnesses stated that accused persons, including the appellant, moved away and then made fire.

9. The statement of Lady Dr. Shazia Nazir (PW-1) and Ex.PB show injuries were inflicted on Rafique Khan on the chest as well as left arm and hand; a large lacerated wound muscle deep, bone exposed on left forearm, whereas one of the hand had a crush injury. None of the ocular account explained the injuries caused on the forearm as well as left hand.

10. As noted above, postmortem report of Rafique Khan was not conducted, as he died after about 12/13 days of alleged incident by renal failure. Generally, postmortem is conducted to examine the cause of death and is not fatal to the prosecution’s case, if ocular account is

immaculate and even the corroborative evidence supports the prosecution case, however, where such is not the case, non-determination of cause of death, can adversely affect the prosecution case. Reliance is placed on case reported as 'Gul Muhammad and another Vs. The State through Prosecutor General Balochistan' (2021 SCMR 381). Likewise, medical evidence only corroborates and supports the ocular account and even if there are minor discrepancies between ocular account and the medical opinion, if eye witnesses are coherent in their evidence then the contradiction is immaterial but if such is not the case, the contradiction can be fatal to the case of the prosecution. Reliance is placed on cases reported as 'Lal Sher Vs. The State and Another' (2021 P Cr. LJ 93) and 'Muhammad Usman and another Vs. The State and others' (2020 P. Cr.LJ 1048).

11. The Hon'ble Supreme Court of Pakistan in case reported as 'Notice to Police Constable Khizar Hayat son of Hadait Ullah on account of his false statement (PLD 2019 Supreme Court 527), highlighted the jurisprudence to be adopted by the courts while adjudicating the matters and discussed the scope of maxim '*Falsus in uno, falsus in omnibus'* and it was observed as follows:-

> *"21. We may observe in the end that a judicial system which permits deliberate falsehood is doomed to fail and a society, which tolerate it, is destined to self-destruct. Truth is the foundation of justice and justice is the core and bedrock of a civilized society and, thus, any compromise on truth amounts to a compromise on a society's future as a just, fair and civilized society. Our judicial system has suffered a lot as a consequence of the above mentioned permissible deviation from the truth and it is about time that such a colossal wrong may be rectified in all earnestness. Therefore, in light of the discussion made above, we declare that the rule falsus in uno, falsus in omnibus shall henceforth be an integral part of our jurisprudence in criminal cases and the same shall be given effect to, followed and applied by all the courts in the country in its letter and spirit. It is also directed that a witness found by a court to have resorted*

to a deliberate falsehood on a material aspect shall, without any latitude, invariably be proceeded against for committing perjury."

12. In the instant case, even though forensic has matched the empties recovered from the scene of crime and the weapon recovered, yet the recovery is not above board inasmuch as recovery witness (PW-10) never went inside the house and was unable to justify the appellant opening the lock of the house.

13. The sumtotal of the above discussion is that ocular account of the prosecution's case is full of material contradictions and the evidence is not reliable. Likewise, the medical account regarding the nature of injuries and how they were caused, does not match with the ocular account. The forensic report *per se* cannot lead to the guilt of the appellant, especially when the ocular account is not trustworthy hence in the said circumstances, the judgment of the learned trial court, is not sustainable.

14. For what has been state above, instant jail appeal is allowed and the impugned judgment dated 24.03.2015 is set aside; consequently, the appellant is acquitted of the charges in the above mentioned case. He shall be released forthwith, if not wanted in any other case.

15. The Murder Reference, sent in the instant matter, is answered in 'negative'.

(CHIEF JUSTICE) **(AAMER FAROOQ)**
JUDGE

Announced in Open Court on 02.09.2021

(CHIEF JUSTICE) **JUDGE**

Zawar