THE STATE

Versus

MUSHTAQ AHMAD

P L D 1973 SC 418

JUDGMENT

MUHAMMAD GUL, 1.-This State appeal by special leave, is directed against the judgment of a Division Bench of the former High Court of West Pakistan, Lahore dated 8-11-66 acquitting Mushtaq Ahmad, respondent herein, on a charge of murder.

The respondent was tried along with his cousin Muhammad Hussain and Siraj Din, by the Additional Sessions Judge. Lahore, under section 302/34, Pakistan Penal Code, for the murder of Muhammad Riaz on the 25th of May 1964, at laudewela (afternoon) at Sultan Mahmood Road, Baghbanpura, a suburb of Lahore. The trial Court convicted the respondent under section 302, Pakistan Penal Code, and sentenced him to death; but acquitted the other two co-accused. There was no appeal by the State against their acquittal. On appeal by the respondent and on reference for the confirmation of the capital sentence, the learned Judges of the Division Bench acquitted the respondent also.

The prosecution case as laid in the trial Court was that the respondent and his two acquitted co-accused carried on the business of ice-vending on a takhat-posh placed on a vacant site on Sultan Mahmood Road. The deceased and his brother Muhammad Aslam (P. W. 12) lived in a house on the same road towards the south at short distance from the takhat-posh. Two months prior to the incident, the deceased Muhammad Riaz remonstrated with the respondent and his cousin Muhammad Hussain for teasing some school girls. This was resented by the respondent and Muhammad Hussain. There was exchange of hot words but nothing untoward happened, though it is stated that relations between the parties became strained on that account.

On the 25th May 1964, at about 8 a.m., the deceased's brother Muhammad Aslam P. W. and one Muhammad Sharif went to the shop of Muhammad Gulzar (P. W. 9) situated quite close to the takhat-posh, to hire a bicycle. When they reached the shop of Muhammad Gulzar, they found that a rehra driven by Sardar Muhammad (P. W. 8) had damaged a bicycle belonging to Muhammad Saeed (P. W. 10). The respondent and Muhammad Hussain, the acquitted accused, demanded from Sardar Muhammad the cost of the repairs which Muhammad Gulzar P. W. estimated to be Rs. 1.50. Seeing Sardar Muhammad reluctant to pay the estimated cost of repairs, the respondent caught hold of the rein of the draught horse to press the demand. At this stage. Muhammad Aslam P. W. intervened and offered to pay the cost of the repairs. This intrusion was resented by the respondent who peremptorily asked Muhammad Aslam to

shut up. As a result, tempers became frayed and the respondent and Muhammad Hussain each picked up a sua (an iron instrument with pointed blade fixed in wooden handle used for cutting ice blocks) to attack Muhammad Aslam. But the parties were separated by onlookers. The respondent, however, said that he would deal with Muhammad Aslam later.

The same day, at laudewela, the two brother', Muhammad Riaz deceased and Muhammad Aslam P. W. coming from their house passed in front of the takhat-posh when the respondent and the two acquitted accused were sitting there. On seeing the deceased and his brother, the respondent and the two acquitted accused shouted "janay na do: mar do" (don't let them go: kill them). With these words, all the three got up, the respondent and Siraj Din, the acquitted accused, picking a sua each ran after the deceased and his brother. Muhammad I3ussain, the other, partner, also gave a chase and as he ran he picked up a khauncha from the milk shop of' Siraj Din (P. W. 13), who however managed to snatch it from Muhammad Hussain. The deceased and his brother Muhammad Aslam both fled for their safety. The deceased, however, was overtaken by Siraj Din acquitted accused, who caught hold of him by his arm. The respondent and the other acquitted accused Muhammad Hussain also overtook him. Siraj Din and Muhammad Hussain, then held the deceased by his arms -and the respondent stabbed him with the sua on the left side of his back. As a result Muhammad Riaz dropped unconscious on the ground. The respondent and the two acquitted accused then turned towards the deceased's brother Muhammad Aslam ,who in order to save himself pulled out from Taskeen Hotel a bamboo about 5ft. in length used as prop to support an improvised projection to keep out sun. Muhammad Aslam wielded the bamboo stick hitting the three assailants on different parts of their bodies. In the meantime, Siraj Din Ahmad Ali and Muhammad Hussain (not produced) shouted that Muhammad Riaz was dead. Upon this, the respondent and his two acquitted co-accused took to their heels. Muhammad Aslam took his brother in an auto-rickshaw to Mayo Hospital. Bit on reaching the hospital, the doctor declared Muhammad Riaz to be dead.

Baghbanpura Police Station was informed of the death of Muhammad Riaz over the telephone by a Foot Constable on duty in the Casualty Ward of Mayo Hospital. On the receipt of the message, Abdul Aziz A. S. I. (P. W. 5) along with two constables proceeded to Mayo Hospital. There he recorded the statement of Muhammad Aslam (Exh. P. A.) which was later registered as F. T. R. (Exh. P. A/1) by S. H. O. Azizur Rahman (P. W. 16). He also proceeded to Mayo Hospital and then to the scene of occurrence for spot inspection etc. At about 8 a.m. H. C. Bashir Ahmad produced the respondent and the two acquitted accused before Azizur Rahman S. H. O. All the three accused had marks of injuries on their persons and their clothes were blood-stained. At the instance of the respondent, sua (Exh. P. 1) was discovered from under a plant of gulabasi near the place of occurrence. On examination by the Chemical Examiner it was found to be blood-stained. But according to the report of the Serologist, the blood stains on the sua had disintegrated and therefore the origin of the blood could not be

determined. Sua (Exh. P. 2) was also discovered from under the Takhatposh at the instance of Siraj, acquitted accused. This was, however, not blood-stained.

The autopsy of the deceased showed that the stab wound measured 1/6' in diameter on the back of the left chest but it has gone deep in the body of the deceased and ruptured the left pleura and left lung which according to the doctor proved fatal. The deceased also had an abrasion 1/6"x 1/6" on the left;: abdomen. In support of the transaction, the prosecution examined besides Muhammad Aslam (P. W. 12), the first informant, Siraj Din (P. W. 13) and Zafar lqbal alias Zafar Muhammad (P. W. 14). Of them, Muhammad Aslam had injuries on his person which established his presence at the spot. War Iqbal is not named in F. I. R. The prosecution, in proof of its case also relied upon the medical evidence and discovery of bloodstained sua (Exb. P. 1).

The respondent and the two acquitted accused denied having caused any injury to the deceased; so also the other allegation leading to the incident. In the trial Court, the respondent gave his version of the incident as follows:-

"The fact of the matter is that I and Muhammad Hussain accused, were sitting on our takht-posh. Four persons came there and gave us dang blows. We bad our backs toward them and, therefore, we could not see them. At that time Siraj accused was sitting at a distance of four or five shops. He came to our help. We became unconscious on accounts of the injuries. Our mother lifted us from the bazar and took us to the police station. I do not know who gave the soowa blow to Riaz deceased."

No evidence was produced in support of this counter-version. The trial Court believed the evidence of Muhammad A slam, Siraj Din Milk-seller and Zafar Iqbal P. Ws. in so far as it attributed the stab injury on the back of the deceased, to the respondent. However, the prosecution case involving the two, acquitted accused Siraj Din and Muhammad Hussain, appeared to the learned trial Judge to be "unnatural, if not fantastic". He was intrigued by the fact which appeared in the evidence of the: above three eye-witnesses, that of the three assailants, Siraj Din: who was also armed with sua and was the first to overtake the deceased, made no attempt to use his weapon until the respondent and Muhammad Hussain had also overtaken the deceased. The trial Judge also considered it incredible that Siraj Din and Muhammad Hussain should have been content to hold the deceased by his arms to let respondent to stab him with a sua. The learned trial Judge was also influenced by certain discrepancies in the ocular evidence regarding the manner in which the three assailants held the accused before the sua was plunged in his back. Because of these, what the learned trial Judge regarded to be "odd features" in the case, he concluded that the case against Siraj Din and Muhammad Hussain was not proved beyond doubt and therefore recorded a judgment of acquittal ins their favour.

In the appeal filed by the respondent, the learned Judges of the Division Bench extended the doubt entertained by the trial Judge so as to affect the entire prosecution case. They virtually disbelieved the evidence of three eye-witnesses examined by the prosecution in proof of the main transaction and the. evidence relating to the recovery of

blood-stained sua (Each. P.1). 7n justification of their total rejection of the prosecution evidence", the learned Jadgea relied upon the Privy Council judgment in Faiz Rakhsh v. The Queen (PLD1959PC24). The fact that both the sides suffered injuries was, in the opinion of the learned Judges, a sufficient reason to conclude that there was a free fight. About the plea of self-defense; the learned Judges thought it was not altogether "discarded" by the learned trial Judge and observed that the respondent's right of self-defense though not established, yet it created doubt with regard to his guilt. Upon that reasoning, the learned Judges set aside the conviction of the respondent.

Leave was granted by this Court for the re-examination of the entire evidence in the case, because the finding recorded by the learned Judges of the Division Bench appeared on the face of it to be self-contradictory, in that, if there was "free fight" between the two parties who had come prepared to fight, then it was incumbent upon the High Court at least to determine the individual liability of each participant. It was also felt that the learned Judges of the Division Bench had not fully examined the evidence in the case.

It would be advantageous to consider at this stage how far the trial Court was justified to discard the evidence of the three eye-witnesses, Muhammad Aslam, Siraj Din and Zafar Iqbal, in so far as they implicated the two acquitted accused for having actively aided the respondent to deal the fatal blow to the deceased with sua (Each. P.1). It is necessary to resolve any lurking doubt on this part of the prosecution case, because the trial Court's treatment of this part of the prosecution case mainly influenced the learned Judges of the Division Bench to doubt the entire prosecution case, on the premise that the doubt regarding the specific part assigned to the two acquitted accused made the ocular evidence produced in the case subject to general doubts affecting the prosecution case as a whole.

It seems to us that in entertaining a doubt as to the manner of assault or Muhammad Riaz deceased, the learned trial Judge overlooked the medical evidence particularly in regard to the location and nature of injuries suffered by the deceased. According to medical evidence, the deceased was "a young man stout in built", and as such must have been equally well matched in physical strength with Siraj Din. acquitted accused, who, according to the prosecution version, was the first to overtake him. Then the trial Judge a13o did not attach any significance to the weapons with which the petitioner and Siraj Din were armed. It is common experience that sua like a knife by its very nature has limited range of effectiveness as a weapon of offence. A person attacked with a sua can, with slight evasive action ward off the attack e.g. by overreaching the attacking hand. In cases of assault by a sua or a knife the victim with little presence of mind, can, by holding the attacking hand in his grip escape unhurt, and even turn the scales against his attacker. The point is brought into sharp relief when we consider that Muhammad Aslant P. W., with bamboo stick in hand was able not only to hold his ground against the three assailants two of whom had a sua each, but also caused injuries to them. This demonstrates the comparative effectiveness of an ordinary stick

over a sua. The location and the depth of the injury on the back of the deceased are also of great significance in the case. The injury was on the back of the deceased and the thrust having regard to its penetration clearly indicates that the victim was completely overpowered enabling petitioner to plunge the sua with full force. This would not have been B possible if the deceased had alight freedom of movement. This offers a strong support to the prosecution version that the deceased was pinned down by the two acquitted accused each holding the deceased by his arm, rendering him helpless to take any evasive action to avoid injury to himself. It is a pity that these important factors escaped notice of the trial Judge as also the learned Judges of the Division Bench. As a result, in the absence of appeal by the State, Siraj Din and Muhammad Hussain accused were lucky to escape punishment. This demolishes the basis upon which the High Court's judgment acquitting the petitioner mainly proceed,

Speaking with due respect, reference by the learned Judges of the Division Bench to the Privy council case noticed above to discard the entire ocular evidence, was also mistaken. They did not bear is mind the principle recently emphasised by this Court In Mst. Hamida Bano v. Ashiq Hussain (P L D 1963 S C 109) which governs the use of the decision in one case as guidance in another. Everything said in a judgment and more particularly, in a judgment in criminal cage must be understood with great particularity " as having been said with reference to the facts of that particular case.

The Privy Council case related to a trial by jury of two accused jointly tried for murder by gun-fire during tire night. The decision in the case turned on the identity of the two accused both of whom had pleaded alibi. The case rested largely on the evidence of three eye-witnesses, who were not independent and who stated that they were able to identify the accused by torch-light and also by calling one of them who was known to the eye-witnesses, by his name. The jury believing the ocular evidence on the identity, of both the accused returned a verdict of guilty. On appeal, the Court of criminal Appeal, from the examination of additional evidence in the form of comparison of the witnesses' statement before the Police with their sworn testimony in Court, maintained the conviction of one of the accused and with regard to the other came to the conclusion that the value and weight of the evidence should be determined afresh by the jury anal not by that Court. It was in that context that their Lordships observed that the credibility of the witnesses cannot be treated as divisible and accepted against one and rejected against the other.

In this case, the occurrence took place in broad daylight. The three accused including the petitioner were known to the 4hree eye-witnesses. 'The informant Muhammad Aslam (P. W. 12 had injuries on his person. Siraj Din (P. W. 13) was absolutely independent and no suggestion, whatever, was made in the cross examination to show that he had any axe to grind. The fact that he has a shop close to the scene of occurrence also made him a natural witness in the case. As to Zafar Iqbal (P. W. 14), it is true that he was not named in the F. I. R. But the omission is quite understandable. Muhammad Aslam's immediate concern was to save the life of his brother and,

therefore, without wasting any time so as to make sure who had actually witnessed the - transaction, rushed his injured brother to Mayo Hospital in an auto-rickshaw. It is significant to point out that Zafar Iqbal is one of the persons named by Muhammad Hussain, acquitted accused, as one of the assailants, who allegedly belaboured him and the respondent.

Thus it will be seen that there is nothing in common between the case before the Privy Council and the facts of the instant case.

Moreover, it has been ruled by this Court in a number of recent cases, that having regard to the social conditions obtaining in this country, the principle falsus in uno, falsus in omnibus cannot be made applicable to the administration of criminal justice and therefore Courts are under a duty to sift "chaff from the grain." Speaking with due respect, this the learned Judges have failed to do in this case.

Apart from their purported reliance upon the Privy Council case noticed above, it is difficult to discover any rational basis for the virtual rejection by the learned Judges of the Division Bench of the evidence of three eye-witnesses, namely Muhammad Aslam, Siraj Din and Zafar Iqbal reinforced by the evidence of the discovery of the blood-stained sua (Exh. P. 1). The) learned Judges discarded the evidence of Muhammad Aslam, because he "made improvements in his statement and had given a different account of the occurrence". These "improvements and differences" apart from some variation in the narration which is natural with the efflux of time, remained unidentified. As respect the essential details, the evidence of this witness was consistent which the trial Court treated as -reliable. About Siraj Din, the learned Judges observed "he had already been disbelieved by the trial Judge . . . . . ." and that "he appears to have participated in the occurrence and P was conscious of his guilt or that of his companions". The first observation proceeds on a misreading of the judgment of the trial Court. There is not a scintilla of evidence to support the second observation which, if we may say so, with due respect, is a pure conjecture. The witness is a milk-seller who has a shop close to the place of occurrence and is named in F. I. R. There is no evidence to show that he accompanied the deceased and Muhammad Aslam from their house with the object of attacking the respondent or his business partners against whom he had no animus. Therefore it is difficult to understand the premises on which the learned Judge felt Justified to reject the evidence of this witness. About the credibility of Zafar Iqbal whose evidence was rejected because he was not named In the F. I. R., reference has been already made in an earlier part of this judgment. Lastly the recovery of sun was witnessed among others by Channan Din (P. W. 7) and Muhammad Ibrahim (P. W. 15) both of whom were independent.

It is also important to point out that the respondent did not specifically raise any plea of self-defence nor did he admit causing the stab wound to the deceased. Even reference by the learned Judges to the respondent having acted in self defence at the highest, was casual, which according to them, was "not established" either. Similarly reference to the possibility of a "free fight" was casual and was not pursued, except perhaps to lay

the foundation for "doubt with regard to the guilt of the respondent . . . . . ." to furnish a reason for a judgment of acquittal.

Mr. Qurban Sadiq, learned counsel for the respondent, sought to support the above treatment of the case by the learned Judges of the Division Bench on the Federal Court's judgment in Safdar Ali v. The Crown (P L D 1953 F C 93). Reference to the precedent case however is due to a superficial view of the judgment in that case in that case the main question of law that fell for the consideration of their Lordships was whether the Privy Council's dictum In Woolmington's case (1935 A C 462) was applicable in Pakistan in spite of the provisions of section 105 of the Evidence Act, 1872?

The dictum can compendiously be stated in the following, much quoted passage from the speech of Viscount Sankey, L. C. which has since been followed as law in England:-

"When dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused and (b), malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked. When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in, reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is. entitled to be acquitted . . . . . ."

While answering the above question in the affirmative in Safdar Ali's case, the learned Chief Justice in his concurring, judgment, summed up the position as follows:-

"Section 105 of the Evidence Act has been enacted 1n order to make it clear that it is not the duty of the prosecution: to examine all possible defenses that might be taken on, behalf of the accused, and to prove that none of those defenses would be of any assistance to him. The principles laid down in Woolmington's case are applicable with full force in Pakistan in spite of the provisions of section 105 of the Evidence Act."But before allowing an accused person, who has ailed to substantiate the plea of self-defence, to avail of the "benefit of doubt" as a second line of defence, as it were, the learned Chief Justice was careful enough to lay the following exacting condition to be observed by the Court :-

"In a criminal case, it is the duty of the Court to review the entire evidence that has been produced by the prosecution and the defence. If, after an examination of the whole evidence the Court is of the opinion that there is a reasonable possibility that the defence put forward by the accused might be true, it is clear that such a view reacts on the whole prosecution case. In these circumstances, the accused is entitled to the

benefit of doubt, not as a matter of grace, but as of right, because the prosecution has not proved its case beyond reasonable doubt"

It is noteworthy from the report of Safdar All's case that appellant before their Lordships, while denying the charge, before the committing Magistrate, stated as follows –

"Abdul Halim deceased gave me knife blow on my thigh and in self-defense I gave him blows with my knife." Similarly, in Muhammad Aslam v. The Crown (P L D 1953 F C 115) which closely followed Safdar All's case the appellant also made the following statement in his defense:

"It was the deceased and his companions who waylaid me and assaulted me vvvith dangs etc. and I acted in self, defense."

Thus, it will be seen that in both cases the pleas of self-defense were not only specifically raised but evidence ,vas also led in support thereof though such evidence was found, in each case, to be inadequate to bring the cases under any general exception. It was in that context that the learned Judges of the Federal Court laid down the rule that in a criminal case even if the plea of self-defense has failed, nevertheless the Court was bound to take into account, all the facts appearing on the record including the evidence led for the defense with a view to finding out whether as a result of such review, the prosecution case has been affected with a reasonable doubt, in which case the accused will be entitled to its benefit.

The question then is, whether on the facts of the instant case, a foundation was laid for application of the rule in Safdar Ali's case. There can be no manner of doubt that the answer must be in the negative. As pointed out already the respondent did not specifically raise a plea of self-defense, nor did he produce any evidence in his defense. Therefore, the possibility of any "reaction" on the prosecution case, is excluded altogether. From a perusal of the judgment under appeal, the impression gained is that the learned judges merely strained she prosecution evidence to furnish, what may be described tenuous basis to lay a foundation for a doubt in favour of the respondent. Needless to emphasize, that any tendency to strain the evidence, whether in favour of the accused or the prosecution, must be scrupulously avoided. Or else highly deleterious results seriously affecting proper administration of criminal justice will follow. Law allows to persons accused o criminal offenses the benefit of "reasonable" and not of imaginary doubts. What is reasonable doubt is not a question of law: it is essentially a question for human judgment by a prudent person to by found in each case, in the light of day-to-day experience in life, after, "taking in account fully all the facts and circumstances appearing on the entire record". It is antithesis of a haphazard approach or reaching a fitful decision in a case.

Learned counsel for the respondent also laid great stress on the fact that from among the witnesses named in F. I. R. Muhammad Sharif, Ahmad Ali and Muhammad Hussain, Proprietor, Taskeen Hotel, were not examined by the prosecution and that raises a presumption against the prosecution version, or, at any rate, that per se was enough to

create a doubt in favour of the respondent of which he should get due benefit. Of the three witnesses, Muhammad Sharif and Ahmad Ali were given up by the prosecution as unnecessary while Muhammad Hussain, Proprietor, Taskeen Hotel, was, not examined because he was won over. As regards the responsibility of the prosecution to examine witnesses named in the calendar of witnesses, in Malak Khan v. King-Emperor (72 I A 305) the Privy Council observed:

"It Is no doubt very important that, as a general rule, ail Crown witnesses should be called to testify at the hearing of a prosecution, but important as it is, there is no obligation compelling counsel for the prosecution to call all witnesses who speak to facts which the Crown desire to prove. Ultimately it is a matter for the discretion of counsel for the prosecution."

In that case their Lordships proceeded to observe that if such witnesses are not produced the Court has a duty to take into consideration such absence but nevertheless must judge the evidence as a whole and setting the evidence led at the trial against the circumstances that all possible witnesses have not been produced and arrive at its conclusion accordingly. That was followed by the Federal Court in Allah Yar v. Crown (P L D 1952 F C 148) in which, as in the instant case, one of the eye-witnesses was not produced because of having been won over by the defence. In that case too it was held that the prosecutor has a discretion in declining to call a witness, although the concerned witness was in attendance at the trial and therefore available to be called and examined by the defence. However, that may be, in our opinion, nothing; turns on the failure to examine the above three witnesses if on the evidence actually produced In the case the offence with which the respondent was charged is brought home to him beyond any reasonable doubt. Finally, learned counsel for the respondent referred to the omission to produce the khauncha which Muhammad Hussain had picked up from the shop of Siraj Din P. W. who later wall able to snatch it, Reference was made to the bamboo stick I which Muhammad Aslam had pulled from Taskeen Hotel anal caused injuries to the respondent and his co-accused but was no!!! I produced. All that need be said about the khauncha is, that it was only an incidental element in the prosecution case for it was neither used in the course of transaction either by the assailants nor the deceased, nor any of the prosecution witnesses. It was pointed out in Ghulam Safdar v. Crown (PLD 1956 FC 126) that it is no part of the duty of the prosecution to prove all incidental matters that are mentioned by a witness in his deposition. The bamboo stick however would not be covered by the above observation, for it is the prosecution case that Muhammad Aslam had wielded the stick causing Injuries to the respondent and his co-accused. But the reasons for its non-production are not far to seek. As pointed out already Muhammad Hussain, the proprietor of Taskeen Hotel, was given up by the prosecution because he was won over by the defence. Therefore, it is not surprising that the bamboo stick was not produced in the case. These omissions in our opinion do not nullify the effect of the three eye-witnesses who were believed by the trial Court coupled with the evidence of recovery of sua (Exh. P. 1).

Having given our careful consideration to the material evidence on the record and the circumstances of the case, in our opinion, the case against the respondent is established beyond any reasonable doubt, and it falls upon this Court to discharge the onerous duty of not allowing him to escape justice and meting out just punishment to him.

Accordingly, we accept this appeal, set aside the judgment of acquittal by the Division Bench in the High Court, and convict the respondent under section 302, P. P. C. for having stabbed Muhammad Riaz to death. Since the incident took place as far back as the 25th of May 1964, in our opinion, the ends of justice will be satisfied by awarding a sentence of rigorous imprisonment for life, and we order accordingly.

S. A. H. Appeal allowed