2015 S C M R 258

[Supreme Court of Pakistan]

Present: Ijaz Ahmed Chaudhry, Dost Muhammad Khan and Qazi Faez Isa, JJ

MUHAMMAD ARSHAD---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.411 of 2007, decided on 18th November, 2014.

(On appeal against the judgment dated 14-12-2006 passed by Lahore High Court, Lahore in Criminal Appeal No.781 of 2000 and Murder Reference No.346 of 2000)

(a) Penal Code (XLV of 1860)---

----Ss. 302(b) & 324---Qatl-i-amd, attempt to commit qatl-i-amd---Re-appraisal of evidence---Pre-planned murder---Strained relations between accused and complainant party---Plea of alibi not proved---Accused was alleged to have killed the deceased and also caused injuries to witnesses---Accused was sentenced to death, which sentence was maintained by the High Court---Validity---Accused was closely related to the complainant party and both parties were known to each other, thus there was no question of mistaken identity or false implication---Injuries on the person of witnesses were serious---Injured witnesses specifically stated that accused had fired upon them---Although statements of injured witnesses were recorded after a delay of 10 days but after the incident they were in an uncertain and unsafe condition and were not able to make statements---Doctor treating the injured witnesses had also refused permission to police to immediately record their statements---High Court had correctly found that accused had strained relations with the complainant party, which was the motive for the occurrence---Plea of alibi raised by accused to the effect that he was in another city at the time of occurrence was not backed by evidence on record---Accused also led to the recovery of weapon of offence---Accused was solely responsible for the occurrence and had committed a pre-planned murder---Prosecution had succeeded in proving its case beyond any shadow of doubt---Appeal filed by accused was dismissed accordingly.

(b) Penal Code (XLV of 1860)---

----S. 324---Attempt to commit qatl-i-amd---Injured witness, statement of---Discrepancy between medical evidence and ocular account given by witness regarding nature of weapon used by accused---Effect---Injured witnesses were not expected to mention exact kind and make of weapon in a situation of sensation and panic---Appeal was dismissed accordingly.

(c) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-i-amd---Quantum of punishment---Death sentence, award of---Convict spending 17 years in death cell---Plea of convict that he was in death cell for 17 years, which period of custody exceeded a full term of imprisonment for life, therefore he deserved leniency in quantum of his punishment---Validity---Long detention alone was not a valid ground for reducing the sentence of accused---In cases of convicts on death row for a lengthy period of time, the court while reducing the sentence was duty bound to advert to all other material pieces of evidence.

Hassan and others v. The State PLD 2013 SC 793 and Dilawar Hussain v. The State 2013 SCMR 1582 distinguished.

(d) Constitution of Pakistan---

----Arts. 13 & 185---Double jeopardy---Death sentence, award of---Convict awarded death sentence undergoing a period of custody equal to more than a full term imprisonment for life during pendency of his legal remedy against his death sentence---Question was as to whether maintaining of death sentence by the Supreme Court would amount to double punishment---Held, when the conviction or acquittal of a person was under challenge in appeal or revision, the proceedings were neither fresh prosecution nor there was any question of second conviction or double jeopardy.

Muhammad Aziz Sindhu, Advocate Supreme Court for Appellant.

Ahmed Raza Qasuri, Additional P.-G. for the State.

Date of hearing: 18th November, 2014.

JUDGMENT

IJAZ AHMED CHAUDHRY, J.---Appellant was tried in a case registered vide F.I.R. No. 233 of 1997 under section 302/34, P.P.C. at Police Station Nawan Kot, Lahore, for having caused murder of Raja Nadeem. The learned trial Court vide its judgment dated 20-5-2000 convicted the appellant under section 302(a), P.P.C. and sentenced him to death. He was also directed to pay compensation amount to the tune of Rs.100,000 to the legal heirs of the deceased, in default whereof to further undergo 6 months' SI. He was also convicted under section 324, P.P.C. on two counts and was sentenced to 10 years' RI with a fine of Rs.50,000 for having attempted to commit Qatl-i-amd of the injured P.Ws. namely Prince Aftab and Seth Munir. In default of payment of fine, he was further directed to undergo 4 months' SI each. The learned High Court converted the conviction of the appellant from section 302(a), P.P.C. to 302(b), P.P.C. but maintained I the death sentence awarded by the trial Court. Appellant filed Jail Petition No.128 of 2007 before this Court, in which leave was granted on 27-11-2007 in the following terms:--

"Syed Ali Hassan Gillani, Advocate Supreme Court appointed for the convict at State expense is not in attendance despite repeated calls in this case involving death penalty. We have, therefore, asked Mr. Javed Aziz Sindhu, Advocate Supreme Court to assist this Court, who is nominated in this case at State expense. Having heard the learned counsel for the petitioner and learned Deputy Prosecutor-General, Punjab, we grant leave to appeal to reappraise the evidence on record in the safe administration of criminal justice."

2. Facts briefly stated are that on the fateful day and time i.e. 3-5-1997 at about 8-45 p.m., complainant Shahzada Almas along with his father Seth Muhammad Munir and two brothers namely Raja Nadeem and Prince Aftab were returning to house. Raja Nadeem deceased, Prince Aftab P.W.2 and Seth Munir P.W.3 were boarding on a motor vehicle (carry dabba) driven by Prince Aftab while the complainant was following them on his scooter. When they reached at Chowk Dhalonwal, Muhammad Arshad appellant armed with pistol, emerged there and fired at the vehicle whereupon Prince Aftab stopped the vehicle. In the meantime his co-accused namely Muhammad Akbar, Muhammad Safdar and Muhammad Amjad all armed with pistols, also came there. The appellant stepped forward towards driver seat and again fired at the vehicle directing the passengers to open the door whereupon Raja Nadeem who was sitting on the rear seat of the vehicle opened the door and tried to overpower the appellant but the latter continued firing as a result of which Raja Nadeem being injured fell down on the ground while Seth Muhammad Munir and Prince Aftab, P.Ws., received injuries inside the vehicle. On the hue and cry of the complainant many persons of the area attracted, thereafter the accused fled away. The injured were immediately moved to Services Hospital Lahore for medical aid where Raja Nadeem succumbed to the injuries and died after few hours. During trial co-accused of the appellant were acquitted on the basis of compromise between the parties.

3. Motive behind the occurrence is that the appellant was addict to drugs. Sister of the complainant who was married to the appellant had come to the house of the complainant along with children due to strained relations. She had also filed a suit for dissolution of marriage. Due to that reason the appellant had extended threats to the complainant party and committed the murder, The prosecution in order to prove its case has produced as many as 17 witnesses. The accused when examined under section 342, Cr.P.C. denied the prosecution story and refuted the allegations and claimed that he has been falsely involved.

4. Learned counsel for the appellant has contended that the F.I.R. was registered after consultation and deliberation; that the complainant was not present at the time of occurrence and was later on brought into the Picture; that had the complainant present at the spot then he should have taken the injured to the hospital instead of asking one Khalid Aziz P.W.6; that the prosecution never produced any evidence to show that the appellant was a drug addict; that neither the wife of the appellant nor his children were produced before the Court to establish that the appellant had strained relations with the family; that the whole story has been introduced to usurp the property of the appellant which he had purchased in the name of his wife; that the injured witnesses being interested cannot be relied upon; that the statement of the injured was recorded after 10 days of the occurrence for which no plausible explanation has been given; that the

ocular account is in contradiction with the medical evidence; that in fact appellant was at Peshawar at the time of occurrence. Learned counsel lastly submitted that the appellant is behind the bars for the last more than 17 years and has relied on Hassan and others v. The State (PLD 2013 SC 793) to contend that the death sentence of the appellants awarded by the two courts below was converted into life imprisonment by this Court on the ground that they have spent about 22 years in death cells and their total period of custody exceeds a full term of imprisonment for life each. Learned counsel also relied on the case of Dilawar Hussain v. The State (2013 SCMR 1582) to contend that the death sentence of the petitioner was converted into life imprisonment on the ground that he had served more than 18 years in jail.

5. On the other hand, learned Additional Prosecutor-General has supported the impugned judgment.

6. We have heard learned counsel for the appellant as also learned Law Officer at some length and have also gone through the evidence.

7. Admittedly the appellant is closely related to the complainant party. He is uncle of the deceased and the other P.Ws. and real cousin of Seth Muhammad Munir, father of the deceased. The marriage of the appellant with sister of the complainant namely Mst. Robeena Shahzadi was solemnized in the year 1980 and both the parties were known to each other. In such situation, there was no question of mistaken identity. All the injured including the deceased were examined by Dr. Mujahid Pervaiz who had prepared the Medico-legal Reports. According to said reports the injuries on the person of the injured witnesses were serious. Both the injured P.Ws. namely Prince Aftab P.W.2 and Seth Muhammad Munir P.W.3 had specifically stated before the trial Court that it was the appellant who had made firing. So far as the contention of learned counsel that the statements of both the injured were recorded by police after 10 days of the occurrence is concerned, we find that both the P.Ws. were in a uncertain and unsafe condition and were not able to make statement. It is also evident from Exh.PR and Exh.PS whereby on the same day the Investigating Officer did approach the relevant Doctor for permission to record the statements of the witnesses but the said permission was denied by the Doctor. So far as the other contention of the learned counsel for the appellant that according to the medical evidence the injuries were caused with a gun whereas as per ocular account the appellant was armed with a pistol is concerned, in that sensation and panic it is not justified to expect from such type of witnesses that they would mention exact kind and make of weapon. As regards the question that had the complainant been present at the spot he should have taken the injured to the hospital, the same is also of no help to the appellant. The complainant has given a plausible explanation that as the appellant had strained relations with his wife, sister of the complainant, due to the apprehension that after occurrence the appellant might not go to harm his wife and children he had immediately rushed to home to warn them. So far as the motive and the defence plea of alibi of the appellant is concerned, the learned High Court has specifically dealt with these issues and has given well reasoned findings, The relevant portion of the judgment of the High Court is as under:--

"A motive for the commission of an offence is always considered to be double edged weapon which can cut both the sides. The circumstances which can instigate a person

to commit an offence can also be used against him for his false involvement, thus assessment is to be made from the circumstances of each case to determine as to which side is being cut by the said double edged weapon. In the present case appellant had strained relations with his wife (daughter of Seth Muhammad Munir) and during the days of the occurrence she was residing at the house of her parents and she had also filed a suit for dissolution of marriage and because of the said circumstances earlier appellant had also extended threats to the complainant party and for that reason, case F.I.R. No.558/1995 was got registered at Police Station Allama Iqbal Town, Lahore. Allegedly, because of the said motive the appellant had committed the murder of Raja Nadeem and caused injuries to Seth Muhammad Munir and Prince Aftab. On the other hand the defence plea taken up by the appellant was that in order to usurp the property purchased by him in the name of his wife complainant had falsely involved him in this case. If this stand of the appellant is accepted, even then it was the appellant who had the grouse against the complainant party and this was another circumstance to ignite the rage inside the appellant to get even with his in laws who had not only taken away his wife and children but had also usurped the property made by him, thus in the circumstances it can easily be said that motive for this occurrence tilts towards the appellant rendering ample support to the ocular account coming through witnesses whose presence at the spot could not be doubted.

As far the defence plea of the appellant that during the days of occurrence he was in Peshawar has no force. Firstly, there is no evidence on the record that on the day i.e. 3-9-1997 appellant was in Peshawar. Secondly, the defence witnesses namely Khan Muhammad D.W.1 and Gul Maula D.W.2 have only stated that they know appellant who resides and work in Peshawar but their statements are silent as to whether they had seen/met the appellant in Peshawar on the day and time of occurrence, thirdly, the said defence witnesses never bothered to appear before the police during the investigation in support of defence plea. Fourthly, during the cross-examination the appellant while making statement under section 340(2), Cr.P.C. has admitted that he never informed the Investigating Officer that at the time of occurrence he was at Peshawar nor he disclosed the names of his defence witnesses before the police officer during the investigation. This defence plea in our view is nothing but a statement made under some legal advise and the same stands rejected."

8. We see no reason to differ with the opinion rendered by the learned High Court regarding motive and defence plea. The appellant led to the recovery of weapon of offence on 24-6-1997 from graveyard of Scheme Mor, Lahore. As regards the non - recovery of empties from the spot, it is observed that evidence of recovery of weapon is merely of corroboratory nature. It is in evidence that at the time of occurrence many people had gathered there. As such non-recovery of empties from the place of occurrence is justified. So far as the circumstantial evidence is concerned, in this context P.W.6 Khalid Aziz deposed that after the occurrence he had evacuated Raja Nadim deceased, P.W.2 Prince Aftab and P.W.3 Seth Munir, both injured, to the Services Hospital. This gets support from Exh.PT, Exh.PU and Exh.PV which are copies of MLR wherein name of aforesaid Khalid Aziz has been shown to be the person who had brought the injured to the hospital. Said P.W. is resident of the street where the occurrence had taken place. As such his presence at the spot is natural. The appellant is solely responsible for the occurrence and has committed a preplanned

murder. In the facts and circumstances of this case and in view of the evidence led, we found no chance of false implication. The evidence furnished by the prosecution regarding motive is credible; ocular account in the form of evidence of P.Ws. 1 to 3 is flawless, confidence inspiring and credible and trustworthy. In the circumstances, the prosecution has made out a case against the appellant on a capital charge.

9. Learned counsel for the appellant has also relied upon the judgments passed by this Court in Hassan and others v. The State (PLD 2013 SC 793) and Dilawar Hussain v. The State (2013 SCMR 1582) and has contended that in that cases the death sentence of the appellants awarded by the two courts below was converted into life imprisonment by this Court on the ground that they have spent about 22 years and 18 years in death cells respectively and their total period of custody exceeds a full term of imprisonment for life each. He contended that the appellant is behind the bars for the last more than 17 years and in view of the above-referred judgments of this Court, he also deserves leniency in the quantum of punishment.

10. After going through the judgments of Hassan v. State supra and Dilawar Hussain supra the contention of learned counsel for the appellant is misconceived. In Hassan v. State supra, this Court has not reduced the quantum of punishment of the accused by solely relying on their period of detention in jail, but has also adverted to other mitigating circumstances. It would be in order to reproduce the relevant portion of the said judgment, which is as under:--

"12. We have given serious and anxious consideration to the question of reduction of the sentences of death passed by the learned courts below against the convicts-appellants to sentences of imprisonment for life and have carefully examined all the submissions made before us in that regard from all the sides. We have found this to be correct that according to the prosecution's own case it was the complainant party which had gone to the place of occurrence whereat the accused party was already present and, thus, it could well be that it was not a case of any premeditation on the part of the accused party and the incident in issue could have taken place when the parties, otherwise inimical towards each other, had come face to face by way of a chance encounter. In a case lacking malice aforethought on the part of the accused party and in a case of an occurrence developing at the spur of the moment this Court, depending upon the circumstances of the case, generally looks at the matter of sentence with some degree of empathy and consideration. It is also borne out from the record, particularly from the statements made before the learned trial court by Muhammad Saad Ullah Khan, Inspector/SHO (P.W.16) and Mian Mushtaq Ahmed, Inspector/SHO (P.W.18), that the case in hand was a case of a fight between the parties during which firing had been resorted to by both the parties. The F.I.R., itself had mentioned that Mushtaq Ahmed deceased was carrying a rifle .7 mm with him at the relevant time and during the spot inspection conducted by the police as many as twenty crime-empties of a rifle .7 mm had been secured from the place of occurrence. It was not the case of the prosecution that any of the accused persons in this case was carrying or had used a rifle .7 mm. The record further shows that although according to the prosecution Sikandar convict-appellant was carrying a rifle 303 at the relevant time yet no crime-empty of rifle 303 had been secured from the spot. The accused party had maintained before the learned trial Court that the complainant party had aggressed against it, which led to

cross-firing between the parties but no independent evidence had been brought on the record by the accused party to support that stand taken by it. Be that as it may the fact remains that according to the investigating officers mentioned above, who were witnesses of the prosecution, there indeed took place cross firing between the parties. It has already been observed by us above that it was the complainant party which had gone to the place of occurrence and in the occurrence that followed both the parties had fired at each other which makes it a case unsafe for conclusively holding that the appellants had committed the murders in issue with a predetermined mind and design. This aspect of the case, in its peculiar background, may call for withholding the extreme sentence of death. The learned counsel for the appellants is quite right in pointing out that Hassan and Sikandar appellants had not caused any injury to one of the murdered persons namely Ghulam Haider and, thus, awarding them a sentence of death even on that count of the charge of murder appears to be rather excessive. It is also true that despite having an ample opportunity to cause more injuries to the complainant party by keeping on firing at it both the appellants namely Hassan and Sikandar had fired from their firearms only once causing one injury each to their victims. When incessant firing was taking place from both the sides, as is evident from the very large number of crime-empties secured from the place of occurrence, the said appellants could have fired more shots causing injuries to more persons of the opposite party but no such allegation had been levelled against them by the prosecution. This aspect of the case may also furnish some justification for reducing their sentences of death to those of imprisonment for life."

11. Similarly in Dilawar Hussain supra long detention was not the sole ground to reduce the sentence of the accused. This factor coupled with other circumstances was the reason which inclined this Court to reduce the sentence of the accused. The relevant portion of the judgment is as under:--

"7. There are number of legal questions involved in the instant case. Out of those legal questions, mitigation is the foremost which always press upon the mind of the Court for reduction in sentence, in criminal cases. Although it is very rare phenomenon to discuss the mitigating circumstances in the review petition, yet, the same are being taken note of as the aforesaid petition is alive before us only to consider the quantum of sentence as such, the same are being discussed here considering those factors to be legal error apparent on the face of record. In the case under discussion the complainant while appearing in the witness box as P.W.2 stated that Nazir Ahmad, deceased, was his father-in-law. He along with his wife came at Fateh Garh to meet his in-laws. At about 6-00 p.m. he along with his father-in-law was going to his Dera. An unknown person met them and told that Dilawar Hussain accused had called Nazir Hussain deceased at the Dera of Ehsan Ullah situated at a distance of one acre. On the call of Dilawar Hussain accused, he, along with Nazir Hussain, deceased reached at the Dera of Ehsan Ullah and saw that Dilawar Hussain accused was present there being armed with rife. An unknown person was also present there along with Dilawar Hussain accused. Dilawar Hussain accused asked Nazir Hussain deceased to return the land which he had purchased from his father and asked him that if he would not return the land to him he would teach him a lesson. Nazir Hussain deceased told Dilawar Hussain accused that he had purchased land from his father against consideration, therefore, he would not return the same. Atta Ullah son of Inayat Ullah and Muhammad Ilayas son

of Inayat Ullah came there during this period, Dilawar Hussain accused again asked the accused to return the land otherwise he would kill him. The deceased in reply told the accused that he is ready to return the land to him if he is ready to pay the consideration. On this Dilawar Hussain accused raised a Lalkara and fired with his rifle at Nazir Hussain which hit him on his left thigh, Nazir Hussain fell down and Dilawar Hussain fled away from the spot along with other unknown person while resorting aerial firing; Nazir Hussain was shifted to the Hospital in injured condition but he succumbed to the injuries on the way when he reached near the village, Muhammad Ilyas P.W.2 who is also an eye-witness of the occurrence narrated the similar story. From the locale of injury the intention of the accused was clear that at the time of occurrence he chose to fire on lower part of the body of the deceased only to threaten the deceased to accede to his desire regarding return of land purchased by the deceased from his father but unluckily the said fire became the cause of death of the deceased. The accused also did not repeat the fire from which it also appears that the purpose of the accused was not to take away the life of the deceased but only to threaten him to return the land. Even otherwise, no empty was collected by the Investigating Officer from the spot. In such circumstances it appears that the petitioner intentionally avoided to hit the vital parts of the body and selected such part which was well known as not containing any vital artery. This intention of the petitioner provides for a strong mitigation to convert sentence of the petitioner into imprisonment for life. This Court in the case of Shafey Ali v. Asrar Beg and 2 others (PLD 1992 SC 232) extended the same sort of benefit to the accused while holding that both the injuries on the deceased which were attributed to the convict were on his buttock. It is correct that the lower part of the buttock is connected with the upper thigh and the upper part of the buttock is connected with iliac region and depending upon the circumstances in each case, particularly the exact locale of the injury would have to be considered to determine the knowledge or intention of the assailant. We are fortified by the judgment of this Court in the cases of M. A. Jalil v. The State (PLD 1969 SC 552), Munawar Hussain v. The State (1983 SCMP 1165) and Shafey Ali v. Asrar Beg and 2 others (PLD 1992 SC 232)."

12. From a bare perusal of the afore-referred judgments, it is crystal clear that only the long detention was not the sole ground which motivated this Court to reduce the sentence of the accused. In such like cases while reducing the sentence it is the duty of this Court to advert to all other material pieces of evidence. Long detention alone is not a valid ground for reduction of sentence. So far as the question as to whether maintaining of conviction of death of an accused; by this Court, who had undergone a period of custody equal to or more than a full term of imprisonment for life during the pendency of his legal remedy against his conviction and sentence of death, would be double punishment or not, it is observed that this Court in a five Members judgment reported at Abdul Malik v. The State (PLD 2006 SC 365) has already held that "when the conviction or acquittal of a person is under challenge in appeal or revision the proceedings are neither fresh prosecution nor there is any question of second conviction or double jeopardy."

13. For what has been discussed above, the prosecution has succeeded in proving its case beyond any shadow of doubt. Finding no merit in this appeal, it is dismissed.

MWA/M-53/SC Appeal dismissed.

;