

PLD 2001 Supreme Court 107

Present: Sh. Riaz Ahmed, Rashid Aziz Khan and Iftikhar Muhammad Chaudhry, JJ

MUHAMMAD MUSHTAQ---Appellant

versus

THE STATE---Respondent

Criminal Appeal No.63 of 1998, decided on 16th October, 2000.

(On appeal from the judgment dated 30-11-1995 of the Lahore High Court, Rawalpindi Bench, Rawalpindi passed in Criminal Appeal No.203 of 1999, Murder Reference No.511 of 1991 and Criminal Revision No. 134 of 1992).

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

---Ss. 302, 307 & 436---Constitution of Pakistan (1973), Art.185(3)---Leave to appeal was granted by Supreme Court to accused for reappraisal of entire evidence on record in the case.

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

----Ss. 302, 307 & 436---Appraisal of evidence---Ocular testimony furnished by the complainant and another witness was not impeached even in lengthy cross-examination by the defence and the same was corroborated by medical evidence as well as by the recoveries of eight crime empties from the spot and the licensed gun presented by the accused himself at the police station-- Delay in sending the said incriminating articles to the Laboratory for expert opinion could not be treated fatal to the prosecution case in the absence of objection of tampering or manipulating the same---Delay of 16 hours in lodging the F.I.R. had been explained by the complainant in his Court statement; even otherwise in the presence of trustworthy and convincing evidence on the record, delay in making the F.I.R. could be ignored ---Eye witness although was not named in the F. I. R, yet he was a natural witness to whom no enmity or ulterior motive was attributed for false involvement of accused in the commission of the offence and his deposition was found to be true ---Pendency of case of accused before the Court for a long time did not entitle him for lesser punishment , on the principle of expectancy of life particularly when he himself was responsible for causing such delay---Convictions and sentences of accused were upheld in circumstances.

Muhammad Iqbal v. Muhammad Tahir and others PLD 1985 SC 361; Sikandar and 2 others v. The State PLD 1980 SC 411; Ch. Muhammad Siddique v. Muhammad Zubair and 4 others 1995 SCMR 1112; Khawand Bakhsh and others v. The State and 2 others PLD 2000 SC 1; Sheraz Asghar v. The State 1995 `SCMR 1365; 1986 PCr.LJ 1297 and Rahim Bakhsh v. Abdul Subhan and another 1999 SCMR 1190 ref.

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

----Ss. 302, 307 & 436---Appreciation of evidence---Delay in sending the incriminating articles to the concerned quarter for expert opinion cannot be treated fatal in absence of objection regarding the same having been tampered with or manipulated.

Muhammad Iqbal v. Muhammad Tahir and others PLD 1985 SC 361 ref.

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

---Ss. 302, 307 & 436---Appreciation of evidence---Delayed F.I.R.---Delay in lodging of F.I.R. can be ignored in the presence of trustworthy and convincing evidence on record.

Sheraz Asghar v. The State 1995 SCMR 1365 ref.

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

----Ss. 302, 307 & 436---Medcial evidence---Doctor has no authority in law to express his opinion as to which weapon was used in the commission of the offence.

1986 PCr. LJ 1297 ref.

Raja Muhammad Akram, Advocate Supreme Court and Ijaz Muhammad Khan, Advocate-on-Record for Appellant.

Sardar M. Ishaq Khan, Advocate Supreme Court and M.A. Zaidi, Advocate-on-Record for the Complainant.

Ch. M. Akram, Advocate Supreme Court for A.-G., Punjab for the State.

Date of hearing: 16th October, 2000.

JUDGMENT

IFTIKHAR MUHAMMAD CHAUDHRY, J.---This appeal is filed by leave of the Court against the impugned judgment, dated 30th November, 1995 passed by Lahore High Court, Rawalpindi Bench whereby following convictions/sentences awarded to him by Additional Sessions Judge, Rawalpindi vide judgment, dated 4th November, 1991 have been confirmed:--

(i) Under section 302, P.P.C.: Death on two counts with fine of Rs.25,000 on each count, in default of its payment to further undergo two years' R.I. on each count. Under section 544-A he was directed to pay compensation of Rs.50,000 on two counts to the legal heirs of the deceased.

(ii) Under section 307, P.P.C.: 5 years' R.I. each on two counts for launching murderous assault on Qaim Din and Kala Khan with fine of Rs.5,000 each on two counts, or in default of payment to further undergo six months' R.I. on each count.

(iii) Under section 436, P.P.C.: Imprisonment for life with fine of Rs.20,000 or in default of payment to further undergo two months R. I.

2. Precisely stating facts of the case as gleaned from F.I.R. No.511 of 1999 Exh.P.G./1, dated 12-9-1980 registered by P.W. Raja Muhammad Munawar, S.H.O./S-I. at Police Station Gujjar Khan on the Fard-e-Bayan of Qaim Din son of Imam Din are that on 11th September, 1980 he was coming back to his house after offering Assar prayer in the village mosque and when he came out of the mosque Fazal Hussain and Noor Hussain sons of Ismail Khan also came there as they were proceeding to offer their prayers in the mosque. In the meanwhile accused Mushtaq also came there. He was holding a gun in his hand. He raised Lalkara saying that they will not be allowed to go alive and simultaneously he fired a shot from his gun, which hit Fazal Hussain on the front side of his chest due to which he fell down on the ground. Appellant Mushtaq also fired two more shots on him when he was lying on the ground. The fires hit on his armpit. Then he again fired two shots which hit Noor Hussain on his right ear and

above the eye (temporal region). Due to firing of appellant Fazal Hussain and Noor Hussain died at the spot. In the meanwhile Kala Khan (not produced) also reached there and he raised alarm saying that why he has committed cruelty. On this accused fired a shot towards Kala Khan who laid down with the result that pellets went out from his shirt. Thereafter he fired second shot on the complainant and the pellets of the fire went out of his Parna wrapped by him on his head. Then Mushtaq accused went to the house of Fazal Hussain where the wife and daughters of Fazal Hussain were present inside the house. They bolted the door from inside. Mushtaq accused set on fire the door of the house by throwing kerosene oil as a result of which the door was burnt and two leaves of Holy Qur'an lying on the shelf above the door were also burnt. Thereafter Mushtaq accused went to the house of Kala Khan son of Allah Ditta, Yaqub and Mehboob sons of Atta Muhammad. There too he set at fire the doors of their houses by throwing kerosene oil. In the F.I.R. the motive as alleged for the commission-of the offence is that Sagheer son of Fazal Hussain had forbidden accused Mushtaq not to pass in front of his house as his sisters are grown up. On this accused Mushtaq had injured Sagheer. Due to this grievance accused Mushtaq has committed the murders of Noor Hussain and Fazal Hussain and also set at fire their houses.

3. As it is evident from the above facts that incident took place on 11th September, 1980 whereas report was lodged on 12th September, 1980 at 10-00 a.m., therefore, delay in lodging F.I.R. was reported to be the harassment created by accused Mushtaq after committing murders of two persons and setting at fire their houses in the village and throughout the night he had been, firing over there. Therefore, no one was able to go to Police station to lodge report.

4. P.W. Raja Muhammad Munawar completed investigation of the case. During course whereof besides taking into possession other incriminating articles he secured blood-stained earth from the places where the dead bodies of Noor Hussain and Fazal Hussain were lying. He also secured eight empties of .12 bore shotgun which were produced subsequently in the Court as Exh.P.14/1-8 vide recovery memo. Exh.P.N. He also took into possession leaves of Holy Qur'an which were partly burnt and torn into pieces vide Exh.P.19/1-2. On 15th September, 1980 appellant appeared in the Police Station and produced his licensed gun as Article P.16 alongwith four live cartridges Exh.P.8/1-4 which were taken into possession vide recovery memo. Exh.P.J. The incriminating empties recovered from the place of incident and the licensed gun presented by the appellant were sent to Forensic Science Laboratory for expert opinion on 15th October, 1980 who later on furnished positive report Exh.P.S. confirming that the incriminating empties were fired from the shotgun Article P.16.

4. On the completion of investigation appellant was sent up to face the trial in the Court of Additional Sessions Judge, Rawalpindi. Before the trial Court appellant did not plead guilty to the charge under section 302/307/436, P.P.C. and claimed to be tried, therefore, prosecution was called upon to produce the evidence.

Before noting the names of the witnesses appeared on behalf of prosecution it is important to note that during pendency of the trial appellant got bail statedly on the completion of statutory period of two years but during trial he jumped the bail on 15th November, 1983 as a result of which his bail was cancelled and he was declared to be proclaimed offender and proceedings under section 512, Cr.P.C. were completed. The case was kept on dormant on 1st November, 1983. Appellant was arrested later on and was brought before the Court on 9th July, 1989, as such on 23rd June, 1990 proceedings of the case again commenced before Additional Sessions Judge, Rawalpindi.

Learned trial Court recorded the evidence of P.W.I Dr. Shamsuddin, Medical Officer who produced post-mortem reports Exh.P.A. and P.B. in respect of Fazal Hussain and Noor Hussain, P.W.2 Khadim Hussain, Constable, P.W.3 Muhammad Sarwar, P.W.4 Ghulam Mustafa P.W.5 Muhammad Din, Draftsman, P.W.6 Zardad, Constable, P.W.7

Abdul Rehman, P.W.8 Qaim Din (eye-witnesses and complaint of murder of both the deceased), P.W.9 Mst. Maqbool Jan witness of the happening of the incident took place in her house after the commission of murder of her husband. P.W.10 Muhammad Jehangir, P.W.11 Eisa Khan, P.W.12 Muhammad Sabir, P.W.13 Ghulam Sabir Meer, P.W.14 Raja Muhammad Munawar, S.H.O. He explained the steps taken towards investigation of the case. He also produced the report of chemical examiner and serologist Exhs.P.Q. and P.R. and that of ballistic expert Exh.P.S. This witness through his statement also brought on record F. I. R. - No.171, dated 9th September, 1980 as Exh. P. P. recorded on the statement of Sagheer son of Fazal Hussain, resident of village Gasroor. As per its contents appellant Mushtaq had beaten him because he has forbidden him not to visit his village particularly near the well where from the womenfolk of village used to collect water. Besides him two C.Ws. namely Subedar Ahmad and Muhammad Tahir were also examined.

The appellant in his statement under section 342, Cr.P.C. denied the prosecution case. However, he did not opt to make statement on oath within the purview of section 340(2), Cr.P.C. nor produced any defence evidence except tendering the certified copy of Exh.D.I perusal whereof indicates that Shabbir Ahmad son of deceased Fazal Hussain was murdered on 23-12-1979 by Niaz Ali son of Muhammad Ismail, Nizabat Ali son of Niaz Ali, Muhammad Arif son of Muhammad Sadiq, Muhammad Aksar son of Muhammad Sadiq, caste Dehmyal.

5. On completion of trial appellant was convicted/sentenced, detail whereof has been mentioned hereinabove. A reference under section 374, Cr.P.C. for confirmation or otherwise of the death sentence was sent to High Court. Appellant also filed appeal challenging the conviction/sentence whereas Muhammad Sagheer son of Fazal Hussain also filed Criminal Revision under section 435/439, Cr.P.C. for enhancement of amount of compensation adequately.

6. Learned Lahore High Court Rawalpindi Bench confirmed the death sentence by answering the Murder Reference in affirmative. However, appeal and revision were dismissed vide impugned order. As such instant petition has been filed. Leave to appeal was allowed for reappraisal of entire evidence.

7. Learned counsel for appellant contended that P.Ws. Qaim Din and Abdul Rehman have not witnessed the incident but they were set up as prosecution witnesses after lodging of F.I.R. Exh.P.G./1 with unexplained delay of 16 hours. As far as P.W. Abdul Rehman is concerned his name was not mentioned in F.I.R. despite of the fact that it was lodged with due deliberation and consultation. Complainant Qaim Din did not sustain injuries on his person though he was also allegedly fired upon by the appellant, therefore, due to this reason his presence at the spot becomes doubtful. The delay in dispatching the incriminating recovered empties Articles P.8/1-4 and pistol Article P.16 remained unexplained, therefore, the supporting evidence of the recovery and the opinion of the Fire-arm Expert cannot be used against the appellant. As-per the statement of P.W. Dr. Shamsuddin one bullet was found at about middle of the left side of thoracic vertebral column and according to learned counsel the murder was not committed with shotgun but with the rifle, therefore, for such reasons a doubt has been created in the case of the prosecution benefit of which cannot be extended to any one else except the appellant. He also stated that prosecution has failed to establish the motive against the appellant because at the best deceased Fazal Hussain can have grudge against Niaz Ali and others who were allegedly involved in the murder of his son Muhammad Shabbir against whom case was registered on 23-12-1979 but surprisingly said Niaz Ali had stood witness of recovery of articles in the instant case, therefore, involvement of the appellant appears to be false.

8. Learned counsel for the complainant Sardar Muhammad Ishaque Khan, stated that prosecution has furnished trustworthy evidence through P.W. Qaim Din (complainant) who had also explained the delay in lodging the F.I.R. at Police Station Gujjar Khan

which is situated -at about 22/23 miles away from the place of incident. Non-mentioning name of P:W. Abdul Rehman in the F.I.R. would not be fatal because his statement was recorded on the same day i.e. 12th September, 1980 by P.W. Raja Muhammad Munawar, S.H.O./I.O. No enmity or animosity has been agitated against this witness by the appellant, therefore, for the reason put forward by appellant his statement cannot be disbelieved. The ocular evidence furnished by eye witnesses has been fully corroborated by the recoveries of incriminating crime empties and licensed gun of appellant as per report of Ballistic Expert as well as medical evidence and the evidence of Mst. Maqbool Jan who has established the incident which has taken place inside her house after the murder of her husband and brother-in-law Noor Hussain. Learned counsel further stated that the appellant is a desperate person because after commission of the murder he put on fire the doors of the house of Fazal Hussain due to which leaves of Holy Qur'an were burnt and thereafter he remained present in the village where he continued firing throughout the night and due to harassment created by him in small village the inhabitants remained confined inside their houses. The trial Court as well as Appellate Court has advanced strong reasons for confirming the conviction/sentence awarded to appellant under different counts. Therefore, in the interest of justice no exception may be taken against the impugned order.

9. Learned State Counsel supported both the judgments and the arguments as advanced by learned counsel for the complainant.

10. We have thoroughly gone through available on record including the F.I.R. Exh.P.G./1, dated 9th September, 1980 produced by P.W. Raja Muhammad Munawar to establish the motive for the commission of the offence. Perusal whereof suggests that the complainant/victim party is resident of Dhoke Ara Dhakhli Gasroor whereas appellant Mushtaq is resident of another village Dhoke Misteryan Dhakhkh. On 8th September, 1980 appellant had assaulted Muhammad Sagheer son of Fazal Hussain with a hatchet because latter had forbidden him not to visit his village because he used to sit in the vicinity of well from where the womenfolk of the village used to collect water. To substantiate the happening of earlier incident prosecution has brought on record F.I.R. No. 171, dated 9th September, 1980 as Exh.P.P. Therefore, on 11th September, 1980 appellant visited Dhoke Ara where both the deceased were living alongwith their family members. It may be noted that appellant was an army man and during the days of incident he was on leave. The evidence furnished by P.W: Qaim Din has fully substantiated the guilt of appellant for the murder of Fazal Hussain and Noor Hussain. Although their version was attempted to be impeached as they were subjected to lengthy cross-examination by the defence but without any substantial result because they successfully stood the test of cross-examination. Their statements were corroborated by the medical evidence/post-mortem report Exhs.P.A. and P.A./1 produced by P.W. Dr. Shamsuddin. Recoveries of eight crime empties and licensed gun which appellant presented himself in the Police Station on 15th September, 1980 is one of the confirmatory evidence in the credit of prosecution.

11. Learned counsel for appellant objected on the lay o sending the incriminating articles i.e. empties and shotgun for expert opinion without offering plausible explanation. A perusal of record revealed that no such objection was raised either before trial Court or the learned Appellate Court. As per settled law the delay in sending the incriminating articles to the concerned quarter for expert opinion cannot be treated fatal in absence of objection of tampering or manipulating the articles as held in the case of Muhammad Iqbal v; Muhammad Tahir and others (PLD 1985 SC 361). Relevant para. therefrom is reproduced hereunder:--

"It may also be pointed out that no suggestion was made in the present case that the knife in question has been tampered with at any stage, either when it was in the custody of, the police or that of the Chemical Examiner. Nor was the Investigating Officer or any other relevant witness cross-examined as to the reason for the delay in its reaching the office of the Chemical Examiner. Therefore, in view of the

observations of this Court in *Sikandar and 2 others v. The State* PLD 198,1 SC 477 the recovery could have been used as corroborating the ocular testimony. Relevant portion of the judgment may be reproduced below:--

'As in the case of *Noon Alain*, the evidence in the present case is that the articles found stained with blood were secured under a proper *Mashirnma* and properly sealed and there was not even a suggestion of any tampering. The Investigating Officer was also not cross-examined as to the delay in sending the parcels to the Chemical Examiner. The High Court was, therefore, not in error in relying on the recoveries as corroboration of the ocular evidence."

It may be pointed out that the judgment in *Sikandar and 2 others v. The State* referred to in the above para. was reported in PLD 1980 SC 411. This Court has again reiterated above observations in the case of *Ch. Muhammad Siddique v. Muhammad Zubair and 4 others* (1995 SCMR- 1112) and *Khawand Bakhsh and others v. State and 2 others*. (PLD 2000 SC 1).

12. It is true that there is a delay of about 16 hours in lodging the F.I.R. from the time Of incident. However, explanation in this behalf has been given by the complainant in his Court statement. In addition to it the p facts and circumstances which have come on record, suggest that appellant after commission of murder of both the deceased namely *Fazal Hussain* and *Noor Hussain* did not make his escape good from the village where incident took place as then he launched attack on the houses of the deceased and due to harassment created by him the inmates of the house i.e. womenfolk of the deceased had to confine themselves in the room but even then appellant , set on fire the doors of the house as a result whereof two leaves of Holy Qur'an were burnt. Thereafter reportedly he stayed in the village and during night he had been over there. Thus for these reasons delay caused in lodging of F.I.R. cannot be considered fatal. Even otherwise delay in lodging F.I.R. under section 154, Cr.P.C. is never considered sufficient to disbelieve the prosecution case because such situation put the Court on notice to undertake close scrutiny of the incriminating evidence available on record to avoid false involvement of the accused and if the evidence recorded in the Court appears to be trustworthy and convincing then delay in lodging of F.I.R. can be ignored keeping in view the peculiar circumstances of each case. In this behalf reference may be made to *Sheraz Ashgar v. The State* (1995 SCMR 1365). As it has been held hereinabove that prosecution has furnished independent ocular evidence of *Qaim Din* (complainant) although the explanation offered by *Qaim Din* in not lodging the F.I.R. is convincing but still if there is any delay in lodging F.I.R. that would not be fatal for the prosecution case in view of peculiar circumstances of the case.

13. Learned counsel contended that P.W. *Abdul Rehman* was not. present at the spot because his name is not mentioned in F.I.R. which was lodged after 16 hours from the happening of occurrence, therefore, his testimony may not be believed. We are not inclined to agree with him because as per record of the case this witness was examined on the same day when F.I.R. was lodged. As far as non-mentioning his name in the F.I.R. is concerned it was not necessary because in such-like matters where heinous crimes are committed the complainant can omit the name of any witness particularly where there is large gathering available either before or after commission of the offence. However, no enmity or ulterior motive to involve the 'appellant-in the commission of the offence has been attributed to the witness, therefore, we are of the opinion that .he being a natural witness has brought on record true facts and his deposition cannot be disbelieved because of the objection of the learned counsel. It is also to be noted that if the prosecution wanted to fabricate the evidence against the accused there was no hurdle' for it, to mention his name in the F.I.R. from the very beginning. Since. investigation of the- case has been conducted in an honest way, therefore, whosoever was important, witness notwithstanding the fact whether his name appeared in the F.I.R., his statement was recorded and he stood to the test of cross-examination during Court statement.

14. Learned counsel further stated that there is contradiction in the ocular and medical evidence because as per statement of P.W. Dr. Shamsuddin one small bullet was found lodged at about middle of the left side of 'thoracic vertebral column, therefore, according to him the prosecution story is false that both the deceased were done away with pellets of shotgun because according to him the bullet was also used. Suffice to observe that as far as contradiction in the medical evidence and ocular testimony is concerned that would only be important when there is contradiction in respect of using crime weapon for, causing injuries; for instance if a person has incised wounds but the medical evidence suggests that injury was caused 'with blunt weapon. Moreover as far as doctor is concerned he has no authority in law to express his opinion as to which weapon was .used as held in 1986 PCr.L1 1297.

15. Learned counsel further contended that the instant case is hinge ring on for last about 20 years, therefore; appellant has acquired expectancy of life as such at. this belated stage it would not be fair to confirm his death sentence. We are not inclined to agree with the learned counsel because appellant himself ,is responsible for causing delay in disposal of the matter pending against him as after his release on bail he remained absconder for a period of six years and secondly if an accused has been inculpated for the commission of. culpable homicide amounting to murder he is liable to normal sentence of death under section 302, P.P.C. and merely for the reason that his case remained pending before this Court he would not be entitled for lesser punishment on the principle of expectancy of life as held by this Court in the case of Rahim Bakhsh v. Abdul Subhan and another (1999 SCMR 1190).

Thus for above discussion we see no substance in the appeal, therefore, the same is dismissed.

N.H.Q:/M-197/S Appeal dismissed.

