

IN THE FEDERAL SHARIAT COURT
(Appellate / Jurisdiction)

PRESENT

MR. JUSTICE SHAHZADO SHAIKH
MR. JUSTICE MUHAMMAD JEHANGIR ARSHAD
MR. JUSTICE SHEIKH AHMAD FAROOQ

CRIMINAL APPEAL NO.33 -Q-2009

Himmat Ali son of Ghulam Nabi
Resident of Khudabadan, Panjgur

Appellant

Versus

The State

Respondent

CRIMINAL MURDER REFERENCE No.01-Q OF 2010

The State

Appellant

Versus

Himmat Ali

Respondents.

Counsel for appellant

Mr. Muhammad Qahir Shah,
Advocate.

Counsel for the State

Mr. Abdul Wasey Tareen,
Prosecutor General Baluchistan

For the complainant

Mr. Nadir Ali Chalgari,
Advocate

No. & date of F.I.R.
Police Station

No.62/2009, dt.29.04.2009
P.S Panjgur

Date of judgment of
the trial court

25.7.2009

Date of Institution

31.7.2009

Date of hearing

21.5.2012

Date of decision

21.5.2012

JUDGMENT:

SH.AHMAD FAROOQ,J:- Through the instant Criminal Appeal, the appellant/ Himmat Ali son of Ghulam Nabi has challenged the judgment dated 25.7.2009, whereby the learned Additional Sessions Judge, Panjgur, has convicted him under section 302(b) P.P.C and sentenced him to death alongwith an order for payment of Rs.100,000/- as compensation to the legal heirs of the deceased as provided in section 544-A, Cr.P.C and in default whereof, to further undergo six months S.I. However, benefit of section 382-B, Cr.P.C, was extended to the convict/accused.

2. The learned Additional Sessions Judge Panjgur has also sent Murder Reference No.1-Q of 2010 for confirmation or otherwise of the sentence of death imposed on the appellant/ Himmat Ali. Both the Criminal Appeal No.33-Q-2009 and the Murder Reference No.1-Q-2010 are being decided through this single judgment.

MR

3. Succinctly, the prosecution story as narrated in the FIR (P/1-A) is that on 20.4.2009, the complainant alongwith his cousins Basit and Waleed was travelling from Panjgur to Khudabadan in a vehicle/cultus of silver colour which was being driven by Basit. At about 7.00 p.m the accused alongwith his absconding companions crossed the vehicle of complainant party while boarded on a vehicle Corolla of black colour and stopped them. The complainant identified two of accused persons as Fateh son of Ghulam Nabi and Amir son of Muhammad Anwar, who were armed with Kalashnikov, the third unknown accused was of middle height, who could be identified by the complainant on his appearance. The accused directed the complainant party to get down from the vehicle and hand over the same to them. The accused/Amir and third unknown accused pushed back the complainant and Waleed, while Basit was resisting the accused/Fateh. The complainant party tried to escape, whereupon the accused made two fires. In the meanwhile, accused/Fateh fired a bullet which hit Abdul Basit and he fell down and the accused took away the vehicle,(cultus) while the dead body of Basit was brought to Hospital in the vehicle of one Muhammad Sharif.

4. After completion of investigation, a report under section 173, Cr.P.C was submitted in the learned trial court for taking cognizance of the offences.

Thereafter the accused/present appellant was charged by the learned trial court, to which he did not plead guilty and claimed to be tried.

5. During the trial, the prosecution in order to substantiate its allegations and to prove the charge, produced nine witnesses, in addition to tendering documentary evidence .

6. Statements of P.Ws have been discussed in detail in the judgment of the learned trial court. However, the gist of the material evidence of the prosecution relevant for the decision of the present appeal is being reproduced below:

P.W.1/ Muhammad Younis is the complainant. He reiterated the version given in the FIR. He is an eye-witness but he was not cross-examined by the learned counsel for the accused despite an opportunity to do so. In his deposition, the complainant has further stated that one Muhammad Shareef reached at the place of occurrence and they transported the dead body of Abdul Basit to the hospital in his vehicle.

P.W.2/ Abdul Waheed, who is a chance witness, deposed that Abdul Basit who was on the driving seat was being beaten by Fatah, Himmat Ali/ present appellant and Mujahid with the butt of the Kalashnikov. He further stated that Fattah made firing upon Abdul Basit due to which he fell down and all the culprits fled away from the scene of crime alongwith the vehicle towards Khudabadan. Further deposed that meanwhile Muhammad Shareef reached at the place of occurrence, who shifted the dead body of Abdul Basit to hospital.

P.W.3/ Asmatullah, who was accompanying P.W.2/ Abdul Waheed at the time of occurrence corroborated the statement of P.W.2 on all material points. He also identified the accused/ Himmat, who was present in the court at the time of recording of his statement.

P.W.4 / Najeebullah is a witness of identification memo of motor cycl, which was produced as Ex.P/4-A.

P.W.5 / Dr.Salahuddin had examined the dead body of Basit Ali son of Haji

Muhammad Naeem aged about 29 years and found the following injuries on his

person:

INJURIES

1. Bullet entrance from left side of chest on upper area of heart laterally and exit from back of left side below the upper angle of scapula posteriorly.
2. A bullet entrance laterally below the right cubitel joint, on elbow joint and exit on same area.

Duration: Fresh
Weapon used: Fire Arm
Nature of injury, Grievous.

P.W.5 had also issued Medico legal certificate which was placed on record as Ex.P/5-A.

PW.6/Siraj Ahmed, ASI is the witness of the recovery memo Ex.P/6-A whereby the last worn blood stained clothes of Basit Ali were taken into possession.

PW.7/Muhammad Hashim is a witness of the recovery of five empties of Kalashnikov SMG from the scene of crime vide memo Ex.P/7-A.

PW.8/Javed Karim, Constable No.374 is the witness of recovery memo Ex.P/8-A in respect of black colour motorcycle/CD-70.

PW.9/Muhammad Ismail, ASI is the Investigating Officer of this case. He stated that he took various steps during the investigation of the case including the recovery of empties of Kalashnikov from the scene of the crime and the arrest of the accused/Himmat Ali. He also recovered one revolver alongwithh four live bullets and a motorcycle 70 C D from the house of the accused . He produced the site plan of the place of occurrence Ex.P/9-A. He clarified that the post mortem of Basit Ali was not got conducted on the request of his legal heirs. He placed on record the report of Forensic Science Laboratory as Ex.P/9-H.

7. After closure of the evidence of the prosecution, statement of the accused/present appellant was recorded under 342 Cr.P.C. The present appellant

denied the prosecution version and claimed innocence. In response to the crucial questions regarding his involvement in this case, he replied as follows:

Question: Why the complainant lodged FIR against you?

Answer: "He did not lodge FIR against me"

Question: Why the prosecution witnesses deposed against you?

Answer: "Falsely deposed"

Question: Do you want to say something else?

Answer: "I am innocent. Wrongly implicated. At the time of occurrence, I was at Mawash Chowk in a wedding ceremony"

The accused/Himmat Ali also got recorded his statement under section 340(2) Cr.P.C. and produced three defence witnesses in disproof of the charges/allegations made against him.

D.W.1 and D.W.2 deposed that the accused/Himmat Ali was playing cards, with them on 20.4.2009 from 3.00 p.m to 8.00/9.00 p.m in the hotel of Ghulam Sarwar situated at Mawash chowk. They denied the involvement of accused/Himmat Ali in the murder of Abdul Basit.

D.W.3 stated that accused/Himmat Ali was arrested on 14.5.2009 at about 9.00 a.m while he was going back to his house after attending a marriage ceremony. He denied that the police conducted any raid at the house of the accused on 14.5.2009 and recovered any article.

8. Upon conclusion of the trial, the learned trial court found the present appellant guilty of committing the offence of the murder of Abdul Basit in furtherance of common intention, falling within the mischief of section 302(B)

PPC and thus convicted and sentenced him as mentioned in paragraph No.1 of this judgment.

9. Being aggrieved by the impugned judgment, dated 25.7.2009, the appellant has challenged the legality and validity of his conviction and sentence through the instant appeal before this Court, whereas the learned Additional Sessions Judge Panjgur has sent murder reference for confirmation of the sentence of death awarded to the appellant.

10. Learned Counsel for the appellant contended that the prosecution has miserably failed to prove its case beyond any shadow of doubt. The complainant has not mentioned the name of the present appellant in the FIR, However after the registration, of case PW.2/Abdul Waheed and PW.3/Asmatullah had nominated the appellant in their statements under section 161 Cr.P.C. before the I.O. He argued that it is a case of two versions, the first version was furnished by the complainant in the shape of FIR as well as in his statement as PW.1 before the learned trial Court, wherein he nominated two accused while the third accused was unknown, whereas the second version, brought on record by PW.2/Abdul Waheed and PW.3/Asmatullah, who are chance witnesses, is totally different from the version of the complainant. According to PW.2 and PW.3, the appellant had given Butt blows of Kalashnikov to the deceased but no recovery of Kalashnikov was effected by the police. Furthermore, only two injuries were shown in the MLC Ex.P/5-A, and except those injuries, no marks/signs of any injury or violence was mentioned by the doctor/PW.5 in his deposition. He contended that the features of unknown accused were not mentioned in the FIR, and after the arrest of the appellant, neither

the identification parade was conducted nor there is anything on record that the appellant is of middle height. He further argued that according to the prosecution story the most important witness is Waleed but he was not produced as witness before the learned trial Court although he was mentioned as eye-witness in the FIR. No role was assigned to the appellant regarding firing upon the deceased. The only role attributed to the appellant by PW.2 and PW.3 was that he had given some Butt blows of the Kalashnikov to the deceased. He asserted that the principal accused namely Fateh Muhammad, who was assigned the role of firing, is real brother of the present appellant, therefore, the appellant has been falsely implicated in this case. He submitted that the evidence of the prosecution is full of contradictions/discrepancies regarding the number of accused persons as PW.1/Muhammad Younis/complainant nominated in the FIR three accused, namely Fateh Muhammad, Amir along with an unknown accused, whereas PW.2/Abdul Waheed and PW.3/Asmatullah stated about five accused. PW.2 and PW.3 claimed that they came to the police station on the same day and got recorded their statements but the I.O. stated that he nominated the appellant as accused in police Zimni dated 11th May, 2009 whereas F.I.R. was recorded on 29.04.2009. He maintained that the statements of PW.2 and PW.3 are highly improbable. He claimed that the ocular evidence is not only self-contradictory but also did not inspire confidence. He asserted that the impugned judgment is the result of non-reading and misreading of evidence on record and the conviction recorded thereon cannot be maintained. He pleaded that the appellant may be acquitted.

11. The learned Counsel for the appellant in support of his arguments has relied upon the case law reported as:- (i) 2012 SCMR 440(Muhammad Akram Vs. The State), (ii) 2002 P.Cr.L.J 270(Quetta) Mir Hazar Vs.The State) (iii) 2005 SCMR 1906 (Mst.Dur Naz and another Vs. Yousaf and another and (iv) 2012 SCMR-419 (Muhammad Sharif Vs. The State).

12. Conversely, the learned Counsel for the complainant submitted that two PWs namely Abdul Waheed/PW.2 and Asmatullah/PW.3 are independent witnesses and they nominated the accused in the instant case. There is no enmity between the complainant and the appellant, therefore, there is no question of false implication of the appellant. Motorcycle was present on the spot at the time of occurrence which was recovered from the house of the appellant. He maintained that the appellant along with his co-accused, with their common intention, committed murder of the deceased, therefore, they all are equally involved in the offence and section 34 PPC is attracted in the instant case. He further submitted that initially the appellant was not nominated in the FIR but soon after the occurrence, two witnesses namely Abdul Waheed/PW.2 and Asmatullah/PW.3 nominated the appellant in their statements recorded by the I.O.

13. The Prosecutor General, appearing for the State, has adopted the arguments advanced by the learned Counsel for the complainant and supported the impugned judgment.

14. We have heard the learned Counsel for the parties and evaluated the evidence as well as the documents available on the record minutely.

15. Admittedly, the present appellant was neither specifically nominated by the complainant in the F.I.R Ex.P/1-A nor during the course of his statement which was recorded as P.W.1 during the trial. No doubt the complainant in addition to two accused namely Fatah son of Ghulam Nabi and Aamir son of Muhammad Anwar did implicate an un known person of middle height but the complainant in the FIR Ex.P/1-A categorically stated that he would identify the unknown accused as and when produced before him. However, it is an admitted fact that no identification parade was got conducted by the investigating officer after the arrest of the convicted accused/present appellant. Moreover, the present appellant is a real brother of a co-accused namely Fatah, who was identified by the complainant at the time of occurrence and as such, it is highly improbable that the complainant could not have identified the present appellant. Strangely, the features of the present appellant, who was shown as an unknown accused in the FIR were not mentioned in the FIR, rather the complainant only alleged that unknown accused was of middle height. The prosecution has not produced any evidence to establish that the present appellant is of an average height. Secondly, Waleed, who was accompanying the complainant at the time of occurrence and had seen the whole incident, has not been produced by the prosecution as a witness during the trial. Similarly, Muhammad Sharif son of Amir Jan, who had transported the dead body of Abdul Basit from the scene of the crime to the hospital has also not been produced as a witness by the prosecution for reasons best known to them. The non-production of aforementioned two witnesses, who had witnessed the occurrence and had direct knowledge of the incident had created a serious dent in the prosecution story. It has been held in the case of Khan Afsar and 2 others Vs. The

State reported in 2011YLR 991 that withholding of best available evidence and suppression of material facts by the prosecution would lead to the conclusion that the case was one of no evidence.

16. According to FIR, the vehicle which was being driven by Abdul Basit deceased was over taken by a Corolla vehicle, out of which three persons alighted and there is no mention of a motorcycle being used by any accused or present at the time of occurrence. Similarly, out of the three accused mentioned in the FIR, only two were alleged to have been armed with Kalashnikov. There is no allegation in the FIR or in the statements of the prosecution witnesses that the present appellant was armed with a pistol/revolver at the time of occurrence. Even in the site plan Ex.P/9-A of the place of occurrence, no motorcycle has been shown. In these circumstances, the recovery of a pistol and motorcycle from the present appellant is immaterial and in no way connects him with the commission of the alleged offence.

17. The learned trial court has given lot of weightage to the statements of P.W.2 and P.W.3. However, it is significant that neither the complainant nor eye witness of the occurrence namely Waleed had nominated the present appellant in their statements recorded under section 161 Cr.P.C. P.W.2 and P.W.3 for the first time introduced a new version of the prosecution story during their statements which were recorded under section 161 Cr.P.C as well as during the trial. Hence, it is a case of two versions on behalf of the prosecution itself and the version which is favourable to the accused is to be accepted. In this regard reliance is placed on 2002 P.Cr.L.J page 270 Quetta and 2011 P.Cr.L.J page 925. In the present case, if

in juxta position with the statement of P.W.2 and P.W.3, who were chance witnesses, the version furnished by the complainant seems to be more plausible, convincing and near to truth. Even otherwise P.W.2 and P.W.3 are admittedly chance witnesses and their names have not been mentioned in the FIR as eye witnesses. Furthermore, P.W.2 and P.W.3 have stated that the present appellant alongwith absconding accused Fattah and Mujahid was beating Abdul Basit with the Butt of the Kalashnikov, whereas no Kalashnikov has been recovered from the present appellant and no injury or Butt blows of the Kalashnikov were found present at the dead body of Abdul Basit deceased either in the inquest report Ex.P 9/B or in the statement of Dr.Salahuddin, who had examined dead body of Basit and appeared in the court as P.W.5. The presence of P.W.2 and P.W.3 at the place of occurrence is also not proved beyond doubt as they were just passerby and their evidence is not corroborated by any independent witness. Surprisingly, the statements of P.W.2 and P.W.3 are also not supported or corroborated by the complainant himself who appeared as P.W.1.

18. Furthermore, there are many contradictions in the statements of the prosecution witnesses regarding the detail of occurrence as well as number of accused persons. The complainant nominated three accused in the FIR as well as in his statement as P.W.1 whereas P.W.2 and P.W.3 have implicated five accused persons. The ocular account of the occurrence given by prosecution witnesses is not corroborated by the medical evidence.

19. Finally, the impugned judgment of the learned trial court is also not sustainable as the present appellant has been found guilty of an offence which he

19. Finally, the impugned judgment of the learned trial court is also not sustainable as the present appellant has been found guilty of an offence which he committed in furtherance of common intention and he has been convicted under section 302(B) PPC and sentenced to death. In the instant case, the charge was framed under section 17(4) Offences Against Property (Enforcement of Hudood) Ordinance, 1979, whereas the accused/present appellant was convicted under section 302(B) PPC. No doubt, according to first proviso of section 24 of Offences Against Property (Enforcement of Hudood) Ordinance, 1979, the court is competent to award punishment to an offender, if he had committed a different offence under any other law. But the fact remains that the common intention generally involves an element of common motive, pre-plan preparation, and actual commission pursuant to such plan. Main ingredients of Section 34 PPC are that a criminal act must be done by several persons, that criminal act must be done to further the common intention of all and that there must be participation of all persons in furtherance of the common intention. The aforementioned ingredients of section 34 PPC are totally lacking in this case as allegedly the co-accused namely Fattah, who is a proclaimed offender, fired a bullet upon Abdul Basit, which caused his death. The present appellant is not even alleged to have caused any injury to Abdul Basit (deceased). In-fact, the presence of present appellant at the time of occurrence has not been established beyond reasonable doubt by the prosecution and as such, he could not have been found guilty of causing the "qatle-i-amd" of Abdul Basit alongwith his co-accused in furtherance of their common intention.

20. For the foregoing reasons, we have arrived at an inescapable conclusion that the prosecution has failed to establish beyond reasonable doubt that the present appellant has committed "qatl-e-amd" of Abdul Basit in furtherance of the common intention of all the accused. Resultantly the instant appeal is allowed, the conviction under section 302(B) PPC and sentence of death recorded by the learned trial court against the present appellant vide judgment dated 25.7.2009 is set aside and he is acquitted of the charge. He shall be released forthwith, if not required in any other case. Murder Reference No.1-Q-2010 is answered in Negative and the sentence of death is Not Confirmed.

sdr

[Redacted Signature]

JUSTICE SHEIKH AHMAD FAROOQ

sdr

[Redacted Signature]

JUSTICE SHAHZADO SHAIKH

[Redacted Signature]

JUSTICE MUHAMMAD JEHANGIR ARSHAD

Quetta, 21.5.2012
M.Akram/

APPROVED FOR REPORTING.

nb

JUDGE