

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR.JUSTICE CH. EJAZ YOUSAF CHIEF JUSTICE
MR.JUSTICE DR.FIDA MUHAMMAD KHAN
MR.JUSTICE ZAFAR PASHA CHAUDHRY

JAIL CRIMINAL APPEAL NO.30/Q OF 2002 (LINKED WITH)
CRIMINAL MURDR REFERENCE NO.1/Q OF 2002

Muhammad Ismail son of Kamal Khan,Caste Mengal, Resident of Kalat.	--	Appellant
		Versus
The State	--	Respondent
Counsel for the appellant	--	Mr.Fazal-ur-Rehman Rana, Advocate.
Counsel for the State	--	Mr.Muhammad Shoaib Abbasi, Advocate.
No.date of FIR and Police station	--	No.91 dated 24.7.1995 P.S.New Sariab Road, Distt;Quetta
Date of the order of Trial Court	--	29.4.2002
Date of institution	--	9.5.2002
Date of hearing	--	11.5.2005
Date of decision	--	11.5.2005

JUDGMENT

CH. EJAZ YOUSAF, CHIEF JUSTICE.- This appeal is directed against the judgment dated 29.4.2002 passed by the learned Sessions Judge (Adhoc), Quetta whereby appellant Muhammad Ismail son of Kamal Khan was convicted and sentenced as under:

Under section 394 PPC - Ten years R.I. and a fine of Rs.10,000/- or in default thereof to further undergo R.I. for one year.

Under Section 324 PPC- Ten years R.I. with Daman Rs.10,000/- which was ordered to be equally distributed amongst the injured persons.

Under section 302(b) - Death sentence.

Both the substantive sentences of imprisonment were ordered to run concurrently. Sentence of death under section 302(b) was ordered to commence first. Benefit of section 382-B Cr.P.C. was, however, extended to the appellant.

2. Facts of the case, in brief, are that on 24.7.1995 report was lodged by one Imam Din son of Muhammad Khan with P.S. Sariab, district Quetta wherein, it was alleged that the complainant was residing in his house in Baloch Colony. The house consisted of three

rooms. The complainant and his mother Mst.Dur Bakht were sleeping in one room whereas, his nephew Nazir Hussain was sleeping in another room. On the eastern side of his house haveli of Maula Bakhsh and Allah Bakhsh, having common wall with his house, was situated. Allah Bakhsh, Jaffar Khan and Mst.Lal Khatoon were sleeping in one room while adjacent to that room Maula Bakhsh and his children were sleeping. It was summer season and doors were opened. At about 4.30 a.m. on hearing shot gun reports complainant woke up and went towards the haveli of Maula Bakhsh alongwith Nazir Hussain. In the meantime, they heard that Mst.Lal Khatoon was crying "thief, thief". On reaching the place of occurrence they saw that Maula Bakhsh having gun shot wound on his chest and thigh was lying on the ground. Mst.Lal Khatoon too, was lying on the ground in a pool of blood. She was also having gun shot wounds on the right side of her chest. She died instantly. Nazir Hussain was also lying in injured condition in a pool of blood with bullet wounds on left side of chest and arm. He also succumbed to the injuries, on the spot. Allah Bakhsh had bullet wound on his left knee and was injured. Many

people had gathered there and with their help the man with a kalashankov was overpowered and handed over to the police who disclosed his name as Ali Ahmad son of Allah Bakhsh. It was added by the complainant that said Ali Ahmad had entered the room of Maula Bakhsh for committing dacoity when Maula Bakhsh altercated with him and as a result of fire made by Ali Ahmad, Mst.Lal Khatoon and Nazir Hussain were killed whereas, Allah Bakhsh and Maula Bakhsh were injured. On the stated allegation formal FIR bearing No.91 dated 24.7.1995 was registered under section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and under section 324 of the Qisas Diyat Ordinance, at the said police station and investigation was carried out in pursuance thereof. It would be pertinent to mention here that since, during investigation, it transpired that real name of the culprit was Muhammad Ismail son of Kamal Khan, therefore, he was accordingly challaned to the Court, for trial, on completion of the investigation.

3. Charge was accordingly framed against the accused/appellant to which he pleaded not guilty and claimed trial.

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4. At the trial, the learned trial Judge, after examining 11 witnesses for the prosecution and the appellant under section 342 Cr.P.C. convicted the appellant under section 17(4) of "the Ordinance" and sentenced him to death as Hadd vide judgment dated 5.5.1999 whereas, for causing injuries to Allah Bakhsh and Muala Bakhsh the appellant was further sentenced to suffer ten years R.I. alongwith a fine of Rs.10,000/- or in default thereof to further suffer one year R.I.

5. The impugned judgment was assailed before this Court vide Jail Crl.Appeal No.64/Q of 1999 whereas, Criminal Murder Reference bearing No.1/Q of 1999 was also sent by the learned trial Judge for confirmation of the death sentence but, since it was found that condition of Tazkiya-al-Shuhood was not satisfied, therefore, Hadd punishment could not have been imposed. Further, since there was no charge under section 324 PPC, therefore, it was held that conviction of the appellant, on that count, was also bad in law. The case, therefore, was remanded for its trial afresh, in accordance with law.

Resultantly, Criminal Murder Reference was also answered in the negative.

6. On remand, the appellant was charged under section 17(4) of "the Ordinance" read with section 302 PPC and 324 PPC.

7. In order to prove the charge and substantiate the allegation leveled against the accused/appellant 19 witnesses, in all, were produced by the prosecution. P.W.1 Maula Dad is witness of the recovery memo, Exh.P/1-C vide which Kalashankov i.e. crime weapon alongwith the empties were taken into possession by the police. He is also a witness of the recovery memos Exh.P/1-A, Exh.P/1-B, Exh.P/1-C, Exh.P/1-D, Exh.P/1-E, Exh.P/1-F, and Exh.P/1-G vide which, blood stained earth and blood stained clothes of the deceased as well as the injured, were taken into possession by the police. P.W.2 Sahib Khan, Dafadar Levies, is a marginal witness of the identification parade memo, Exh.P/2-A. He deposed that real name of the appellant was Muhammad Ismail S/o Kamal Khan. P.W.3 Abid Ahmad had partially investigated the case. P.W.4 Maula Bakhsh is another witness of the inventories. P.W.5 Maulvi Habib-ur-Rehman

is the witness of inventory of pointation of the accused. P.W.6 Allah Bakhsh is an eye-witness of the occurrence. P.W.7 Jaffar Khan is another eye-witness of the occurrence. P.W.8 Khair Muhammad who confirmed that real name of the accused was Muhammad Ismail instead of Ali Ahmad as disclosed by him when apprehended. P.W.9 Dr.Manzoor Hussain, produced the death certificate of Mst.Lal Khatoon and the Medical Certificates of the injured. P.W.10 Jaffar Ali is the Investigating Officer of the case. P.W.11 Rafique Ahmad, had prepared site plan of the incident. P.W.12 Malik Rahmat who too, confirmed that accused was Muhammad Ismail son of Kamal Khan. P.W.13 Syed Abdullah, the Chemical Examiner who produced report qua the blood stained articles. P.W.14 Imam Din, too, is an eye-witness of the occurrence. P.W.15 Muhammad Azeem is the witness of extra-judicial confession. P.W.16 Nazar Jan, had registered the FIR on the basis of the complaint. P.W.17 Muhammad Akhtar, who after obtaining medical certificate of the injured, had prepared the challan. P.W.18 Muhammad Iqbal, the Fire Arm Expert, who had produced report Exh.P/18-A qua the arms as well as ammunition recovered

from the possession of the appellant. P.W.19 Nawab Ahmad, S.I. too, had partially investigated the case.

8. On the conclusion of the prosecution evidence the appellant was examined under section 342 as well as under section 340(2) Cr.P.C. In his above statement the appellant denied the charge and pleaded innocence. Stand taken by him, at the trial, was that about 7 and a half years ago, he was arrested by the police when he was going towards Sariab Mill in order to see his wife and in-laws. Subsequently, he was handed over to CIA police. He further pleaded that his confessional statement was not recorded by the Magistrate and that neither he had entered the house of someone for the purpose of committing dacoity nor any body sustained injuries or died as a result of the firing made by him. In the course of his statement he, however, admitted that the complainant party was not inimical towards him.

9. After hearing the arguments of the learned counsel for the parties, the learned trial Judge convicted the appellant and sentenced him to the punishments as mentioned in the opening para hereof.

10. We have heard Mr.Fazal-ur-Rehman Rana, Advocate for the appellant, Mr.Muhammad Shoaib Abbasi, Advocate, learned counsel for the State and have also perused the entire record with their assistance, carefully.

11. Mr.Fazal-ur-Rehman Rana, Advocate, learned counsel for the appellant has, at the very outset stated that since after going through the record of the case he is of the view that involvement of the appellant in the offence cannot be ruled out, therefore, he would not challenge the conviction recorded against him but would only pray that he being first offender, may be dealt with leniently.

12. Mr.Muhammad Shoaib Abbasi, Advocate, learned counsel for the State, on the other hand, has urged that the appellant had entered in the house of the deceased in the odd hours of night. He tried to commit robbery and since resistance was offered, therefore, he murdered Mst.Lal Khatoon and Nazir Hussain besides causing injuries to both the eye-witnesses namely, Allah Bakhsh and Maula Bakhsh. He was caught red-handed alongwith the crime weapon i.e. the kalashankov. The empties recovered from the place of occurrence

also wedded with the recovered weapon. The appellant had also confessed his guilt before Maulvi Habib-ur-Rehman, the witness of extra-judicial confession and since his guilt, at the trial, was fully brought home, therefore, the impugned judgment was unexceptionable. He pleaded that since it was a cold blooded murder, therefore, the appellant does not deserve to be treated with leniency.

13. We have given our anxious consideration to the respective contentions of the learned counsel for the parties. In the instant case, the appellant was caught red-handed alongwith the crime weapon i.e. Kalashankov. Both the eye-witnesses i.e. P.W.4 Maula Bakhsh and P.W.6 Allah Bakhsh have, at the trial, unequivocally deposed that appellant was the same person, who had committed murder of Mst.Lal Khatoon and Nazir Hussain. Since both the injured eye-witnesses had also sustained bullet injuries, in the course of occurrence, therefore, their presence at the place of occurrence, cannot be doubted. Kalashankov recovered from the possession of the appellant also wedded with the empties recovered from the place of occurrence which lends further support to the prosecution version. The Arms

Expert's report i.e. ~~Exh.P/18-A~~ is explicit in this regard. The Chemical Examiner's report Exh.P/13, qua the blood stained articles, is also positive. Appellant was also correctly identified by all the witnesses. Further, the medical evidence, furnished by the prosecution, is indicative of the fact that deceased persons as well as the injured eye-witnesses all sustained bullet injuries and thus renders further corroboration to the prosecution story. Though the prosecution has also relied on the evidence of extra judicial confession allegedly made by the appellant before P.W.5 but the same, in view of the bar, contained in Article 39 of the Qanun-e-Shahadat Order, 1984 was not admissible as the appellant at the relevant time was in custody of the police. However, we are of the view that rest of the evidence produced, at the trial, was sufficient to bring home charge against the appellant because as per appellant's own admission the complainant party was not inimical towards him and, therefore, there was neither any cause nor occasion to substitute the appellant for the real offender. Whereas, in view of the fact that the appellant was

apprehended at the place of occurrence alongwith the crime weapon,
the defence plea appears to be sham, on its face.

As regards identity of the appellant it may be pointed out that though the appellant, in the course of his statement on oath, at the trial has not disputed his identity as Muhammad Ismail son of Kamal Khan but since he at the time of his arrest had disclosed his name as Ali Ahmad son of Allah Bakhsh, therefore, three witnesses i.e. P.W.8 Khair Muhammad, P.W.,15 Muhammad Azeem and P.W.2 Sahib Dad, were produced by the prosecution to establish that real name of the appellant was Muhammad Ismail son of Kamal Khan. P.W.2 Sahib Dad disclosed that he had arrested the appellant in another case and in that case the appellant had disclosed his name as Muhammad Ismail whereas, it was deposed by P.W.8 that accused was working with him on a truck with the name of Muhammad Ismail. P.W.15 Muhammad Azeem has confirmed that in his presence the appellant had admitted that he had wrongly given his name as Ali Ahmad at the time of his arrest. All the three witnesses are independent witnesses and they too, have no motive to falsely involve the appellant, in the

crime. Hence, their statements were rightly believed by the learned trial Judge.

14. The learned counsel for the appellant has pleaded that since appellant was the first offender, therefore, a lenient view may be taken in the matter of his sentence but we are afraid in the absence of any mitigating or extenuating circumstance, the request cannot be acceded to.

It is well-settled that normal penalty for Qatl-e-Amd is the sentence of death and when the case is fully proved by the prosecution it must be inflicted. Though in some cases where the accused is able to prove that he was deprived of his capability of self control or was swayed away by circumstances immediately preceding the act of murder or there was an immediate cause leading to grave provocation or in case of doubt as to who, in case of several accused persons, was responsible to cause the fatal injury, etc the sentence of life imprisonment or lesser sentence may be imposed but since it is a double murder case and is cold blooded, therefore, we are of the view that the appellant deserves with no leniency.

This view receives support from the following reported

judgments:-

- (i) Ijaz alias Billa and three others vs. The State 2002 SCMR 294 2002 SCJ 575;
- (ii) Sakhawat vs. The State 2001 SCMR 244;
- (iii) Muhammad Fazal vs. Ghulam Asghar and other PLD 2000 SC 12;
- (iv) Ch.M.Yousaf and another vs. The State 1992 SCMR 983;
- (v) Waris Ali alias Dulti and other vs. the State 1999 SCMR 1469;
- (vi) Pervez and others vs. The State 1998 PSC (Cr)875;
- (vii) Noor Muhammad vs. The State 1999 SCMR 272;
- (viii) Mst.Bismillah and other vs. M.Jabbar and other 1998 SCMR 862;
- (ix) Muhammad Sharif vs. Muhammad Javed alias Jemma Tedi PLD 1976 SC 45;
- (x) Muhammad Nasrullah vs. The State 2003 SCMR 189;
- (xi) Muhammad Saleem vs. The State PLD 2002 SC 558;
- (xii) Sher Dil etc. vs. The State SBLR 2003 FSC 19;
- (xiii) Sattar alias Satti and another vs. The State and another PLD 2005 Kar.151;

It would be worthwhile to mention here that in a recent judgment delivered in the case of Syed Hamid Mukhtar Shah vs. Muhammad Azam and two others (2005 SCMR 427), the Hon'ble Supreme Court of Pakistan has been pleased to hold that where the occurrence, resulting in a murder, had taken place at the spur of the moment and even where only one shot is fired and the same had not

been repeated the only penalty deserved by the killer was the normal punishment of death prescribed for the offence.

15. The upshot of the above discussion is that this appeal is dismissed. Convictions and sentences recorded against appellant Muhammad Ismail son of Kamal Khan by the learned Sessions Judge (Adhoc), Quetta vide judgment dated 29.4.2002, are maintained.

Consequently, Criminal Murder Reference No.1/Q of 2002 is answered in the affirmative.

These are the reasons of our short order of the even date.

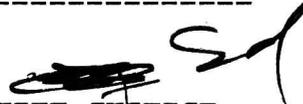

(Dr.Fida Muhammad Khan)
Judge


(Ch. Ejaz Yousaf)
Chief Justice


(Zafar Pasha Chaudhary)
Judge

FIT FOR REPORTING

Islamabad, dated the
11th May, 2005
ABDUL RAHMAN/**


CHIEF JUSTICE

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