

IN THE FEDERAL SHARIAT COURT

(APPELLATE JURISDICTION)

PRESENT

MR. JUSTICE MUHAMMAD NOOR MESKANZAI, CHIEF JUSTICE
MR. JUSTICE DR. SYED MUHAMMAD ANWER
MR. JUSTICE KHADIM HUSSAIN M. SHAIKH

CRIMINAL APPEAL NO.06-Q OF 2019

ALI MUHAMMAD SON OF WALI JAN, RESIDENT OF GHARIB
ABAD, DISTRICT PISHIN, PRESENTLY CONFINED AT
JUDICIAL LOCKUP/JAIL, DISTRICT PISHIN.

APPELLANT

VERSUS

THE STATE.

RESPONDENT

CRIMINAL APPEAL NO.07-Q OF 2019

NAJEEBULLAH SON OF FIDA MUHAMMAD, RESIDENT OF
GHARIB ABAD, DISTRICT PISHIN, PRESENTLY CONFINED
AT JUDICIAL LOCKUP/JAIL, DISTRICT PISHIN.

APPELLANT

VERSUS

THE STATE.

RESPONDENT

CRIMINAL MURDER REFERENCE NO.01-I OF 2019

THE STATE.

VERSUS

1. NAJEEBULLAH SON OF FIDA MUHAMMAD
2. ALI MUHAMMAD SON OF WALI JAN,

BOTH RESIDENT OF GHARIB ABAD, DISTRICT PISHIN,
PRESENTLY CONFINED AT JUDICIAL LOCKUP/JAIL,
DISTRICT PISHIN.

CONVICT-RESPONDENTS

COUNSEL FOR THE APPELLANT- ALI MUHAMMAD	...	MR. HAMIDULLAH ACHAKZAI, ADVOCATE.
COUNSEL FOR THE APPELLANT- NAJEEBULLAH		MR. ARSLAN KHAN, ADVOCATE.
COUNSEL FOR THE STATE	...	MR. AMEER HAMZA MENGAL, DEPUTY PROSECUTOR-GENERAL, BALOCHISTAN.
FIR NO. DATE AND POLICE STATION	...	33, 18.12.2015, LEVIES, SARANAN, DISTRICT PISHIN.
DATE OF JUDGMENT OF TRIAL COURT	...	19.11.2019
DATE OF INSTITUTION OF BOTH CRL. APPEALS	...	29.11.2019
DATE OF FILING OF MURDER REFERENCE	...	22.11.2019
DATE OF HEARING	...	06.04.2021
DATE OF JUDGMENT	...	30.04.2021

JUDGMENT:

DR. SYED MUHAMMAD ANWER, J Through this consolidated judgment, we intend to dispose of Criminal Appeals No.06-Q and No.07-Q of 2019, preferred by convict/appellants, namely, Ali Muhammad and Najeebullah, respectively, against the judgment dated

19.11.2019 delivered by the learned Additional Sessions Judge/MCTC, Pishin, whereby they have been convicted under Section 302(b) read with Section 34 of the Pakistan Penal Code, 1860 and sentenced to death on two counts for committing murder of Wali Jan Agha and Dawood Agha. Their sentence of death was subject to confirmation by this Court. They have also been convicted under Section 394 read with Section 34 of the Pakistan Penal Code and sentenced to 10 years R.I. each with fine of Rs.10,000/- each, in default whereof to further undergo one year simple imprisonment each.

2. The learned trial Court sent Reference under Section 374 of the Code of Criminal Procedure, 1898 for confirmation or otherwise of sentence of death awarded to the convict-appellants.

3. Earlier, this case was tried by the learned Additional Sessions Judge, Pishin and vide judgment dated 25.03.2019, the convict-appellants Ali Muhammad and Najeebullah were convicted under Section 302 (b) read with Section 34 PPC and sentenced to life imprisonment for committing Qatl-e-Amd of deceased Wali Jan Agha and to pay Rs.2,00,000/- to the legal heirs of the deceased collectively in equal share under Section 544-A Cr.P.C. in default whereof to further suffer S.I. for six months each. They both were also convicted under Section 302(b) read with Section 34 PPC and sentenced to life imprisonment for committing murder of Dawood Agha and to pay

Rs.2,00,000/- collectively in equal share under Section 544-A Cr.P.C., in default whereof to further undergo six months S.I. They both were also convicted under Section 392 read with Section 34 PPC and sentenced to 10 years R.I. each and to pay fine of Rs.10,000/- each, in default whereof to further undergo one year S.I. They both were further convicted under Section 353 PPC read with Section 34 PPC and sentenced to two years S.I. each. All the sentences were ordered to run concurrently with benefit of Section 382-B Cr.P.C. except the sentence of default of payment for compensation and of fine.

4. Being aggrieved with the judgment dated 25.03.2019, the convict-appellants Ali Muhammad and Najeebullah filed Cr. Appeals No.03-Q and 04-Q of 2019, respectively, before this Court and after hearing the said appeals vide judgment dated 29.08.2019 passed by this Court, the judgment of learned Trial Court dated 25.03.2019 was set aside and the case was remanded to the learned Trial Court with direction to re-hear the arguments and re-write the judgment by completely adhering to the provisions of Section 367 of Cr.P.C.

5. After re-hearing arguments of the parties, both the appellants were convicted and sentenced as mentioned in opening para of this judgment.

6. Succinctly, the case of the prosecution arising out of Crime-Report (Ex.11-A) lodged by Bor Jan Agha (P.W.1) is that on 18.12.2015 at 8:00

a.m., the complainant along with his brothers Wali Agha, Dawood Agha and his relative Mano Jan (during trial appeared as Abdul Malik/PW-2) proceeded to Chaman from Saranan Camp. When they passed railway crossing, they saw a black colour motorcar, wherein four persons were boarded, was coming from opposite side. They signaled the complainant party to stop. The complainant party saw those four persons in that black car were armed with pistols. Then the complainant party turned their vehicle in opposite direction, whereupon the accused persons, started chasing the complainant's car and they brought their car in front of complainant's car and stopped by it colliding it. Then accused persons forcibly tried to snatch complainant's vehicle. During this commotion, the complainant made a phone call to the nearest Levies post regarding the criminal act, which was being committed. In the meanwhile, brother of complainant Wali Agha and Dawood Agha offered resistance to the culprits, whereupon the accused persons made firing at them, as a result, Dawood Agha and Wali Agha sustained injuries and died. The accused persons ran away on foot from the scene of occurrence. Meanwhile the Levies authorities reached there and on the pointation of the complainant, the Levies authorities chased and arrested two of the accused persons. Upon arrest, one of the accused persons, who fired and committed murder of Wali Agha disclosed his name as Najeebullah, while the other accused who committed the murder of Dawood Agha disclosed his name as Ali Muhammad.

7. The investigation ensued as a result of which Muhammad Younis, Naib Risaldar (P.W.11) was assigned the charge of investigation. He visited the place of occurrence, prepared site plan and recorded the statements of witnesses under Section 161 Cr.P.C. He recovered six empties of T.T. pistols, one empty of 9MM pistol from the place of incident (Ex.P/3-C). He also recovered six empties of T.T. pistol and 11 empties of 9MM pistol fired at Levies personnel during their pursuit when the accused persons tried to run away from the crime scene (Ex.P/3-D). He recovered T.T. pistol No.Nil/636 (Ex.P/4-F) at the pointation of accused Najeebullah and one 9MM pistol (Ex.P/4-H) at the pointation of accused Ali Muhammad. He also recovered 25 empties of Kalashnikov fired by Levies personnel at the place of occurrence (Ex.P/7-A) during the exchange of fire. The identification parade of both the accused persons (Ex.P/8-A to Ex.P/8-D) was conducted, who were duly identified by the P.Ws before Judicial Magistrate. The Investigating Officer sent recovered pistols and empties to the Forensic Science Laboratory, Karachi, on 28.12.2015 vide his application Ex.P/11-K. Ultimately, after completion of investigation, report under Section 173 of the Code of Criminal Procedure, 1898 was submitted against the accused persons, requiring them to face trial.

8. The charge was framed against both the accused/appellants Ali Muhammad and Najeebullah by Anti-Terrorism Court-II,

Quetta, under Section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, Sections 302, 324, 353, 186, 34 of PPC and 7-A, ATA, 1997 to which they pleaded not guilty and claimed trial. The other accused Naqeebullah alias Muhammad Khan and Hayatullah were declared absconders vide statement of CW-1 Muhammad Younis, Naib Risaldar.

9. On 27.11.2018, the instant case was transferred to the learned Additional Sessions Judge/MCTC, Pishin, after deleting Section 7 of Anti-Terrorism Act, 1997.

10. The prosecution in order to prove its case, examined 11 witnesses. The gist of the prosecution evidence is as under:

- i) Bor Jan appeared as P.W.1. He is complainant of the case and he deposed the same facts as narrated in the F.I.R.
- ii) P.W.2 Abdul Malik, is eye-witness of the instant case. He endorsed the statement of the complainant.
- iii) Athar Khan, Naib Risaldar, appeared as P.W.3. He is marginal witness to various recoveries memos.
- iv) P.W.4 was Abdul Nafay, Dafedar. He is also marginal witness to various recoveries memos.
- v) Naib Risaldar, Saifullah was P.W.5. He immediately reached the place of occurrence and after exchange of fire apprehended both accused persons at the spot.
- vi) Naib Risaldar, Inayatullah appeared as P.W.6. He is witness to memo of disclosers made by accused Najeebullah (Ex.P/6-J) and Ali Muhammad (Ex.P/6-K).

- vii) Abdul Ghaffar, Hawaldar, was P.W.7. He is witness to recovery of 25 empties of Kalashnikov (Ex.P/7-A), two motorcars of complainant and accused persons (Ex.P/7-B), recovery of Photostat documents of complainant's car (Ex.P/7-C) and six pictures of two cars of complainant and accused persons (Ex.P/7-D).
- viii) P.W.8 was Muhammad Kabir Kakar, Judicial Magistrate. He had conducted identification parade of accused Ali Muhammad (Ex.P/8-A) (Ex.P/8-B) and Najeebullah (Ex.P/8-C) and (Ex.P/8-D), wherein they were identified by the witnesses.
- ix) Inayatullah, Dafedar appeared as P.W.9. He was witness to recovery memo of two blood stained Qameez (Ex.P/9-A).
- x) Dr. Abdul Baseer, appeared as P.W.10. On 18.12.2015 at 9:00 a.m., he conducted medical examination on the dead bodies of deceased Dawood Agha and Wali Agha.
- xi) Muhammad Younas, Naib Resildar was P.W.11. He was Investigating Officer of this case and his role has already been discussed in preceding para.

11. The convicts/appellants recorded their statements under Section 342 Cr.P.C. when confronted with the evidence led by the prosecution controverted the same, pleading innocence. They neither opted to be examined on oath under Section 340(2) Cr.P.C. nor produced any evidence in their defence.

12. After hearing the parties, the learned Trial Court convicted and sentenced the two accused persons as mentioned in opening paragraph of this judgment, whereas two accused persons (Naqeebullah alias

Muhammad Khan and Hayatullah) were declared as absconders in this case.

13. The learned Counsel appearing on behalf of convict/appellant Ali Muhammad argued that according to prosecution story, there were four accused, may be the victim had sustained injuries at the hands of those accused persons, who are absconders; therefore, there is room for benefit of doubt. He also argued that out of alleged four accused, two made their escape good and the two allegedly arrested at the spot were declared murderers. He further argued that according to prosecution story, the complainant was busy to call Levies personnel and simultaneously watching the incident, which is not practicable and possible. He added that the venue is stated to be a public place being a main road, so why no public witness was made in respect of offence when it was committed at public place. He also added that Hafeezullah, Naib Risaldar/Incharge Levies Thana, who after receipt of phone call rushed to the place of incident, was neither cited nor produced as witness of the occurrence. He further added that identification parade was conducted after 13 days and there is possibility of showing the accused to the witnesses. He asserted that since the prosecution case is full of contradictions, improvements and the two absconders could be arrested in such manner that the convicts/appellants are entitled for acquittal as prosecution has not been able to prove its case beyond reasonable doubt.

14. Learned counsel appearing on behalf of the convict/appellant Najeebullah adopted the arguments advanced by learned counsel for the convict/appellant Ali Muhammad.

15. Conversely, learned Deputy Prosecutor-General appearing on behalf of the State argued that the recoveries have been effected in consequence of disclosure memo, hence, it is legal within the meaning of Article 40 of the Qanun-e-Shahadat Order, 1984. He also contended that sufficient evidence has been brought by the prosecution to connect the appellants with commission of alleged offence, who were duly armed with deadly weapons along with their accomplices. The evidence available in file undoubtedly proves that the appellants committed murder of Dawood Agha and Wali Agha. He finally supported the impugned judgment and contended that the impugned judgment is based on sound and cogent reasons, which does not warrant any interference.

16. We have heard the arguments and perused the record.

17. At the time of arrest, the accused persons were in possession of the firearm/weapons used in the commission of the said offence, so much so that in order to avoid their arrest, they made every effort including firing upon Levies and endeavour of escape from the crime scene. In consequence thereof, the Levies authorities in response to deter the culprits, had to make firing upon the culprits; consequently, the culprits were arrested where encounter took place. The crime was

committed by the accused in broad day light, in presence of eye-witnesses and they were arrested almost red handed. The statements of all the witnesses specifically the statements of all the relevant witnesses, i.e., P.W.1, P.W.3 and P.W.7 matched with one another and clearly supports the version of the prosecution beyond any doubt. The recoveries of empties of T.T. pistol vide recovery memo (Ex.P/3-C) and recovery of empties of 9.MM vide its recovery memo and recovery memo of 25 empties of Kalashnikov as Ex.P/7-A and the positive report of Forensic Science Laboratory regarding them are also strong corroborative pieces of evidence to prove the case of prosecution.

18. The depositions of P.W.1 and P.W.5 further strengthen the version of prosecution that the complainant at the earliest possible moment called the Levies rather the mobile phone call was made by the complainant to the Levies while the crime was being committed. The Levies being in close proximity to the crime scene almost instantaneously reached there and upon the pointation of the complainant, the accused who were fleeing were chased by the Levies and the accused to ensure their escape fired upon Levies. Levies succeeded to arrest the accused within short distance from venue. The Levies arrested the accused and then registered the case of complainant. The recoveries of T.T. pistol and 9.MM pistol realized in the consequence of disclosure of accused Najeebullah (Ex.P/6-J) and disclosure of accused Ali Muhammad (Ex.P/6-K) respectively. The

extrajudicial confession of the accused persons to the extent of these recoveries fall within the parameter of admissibility under Article 40 of the Qanun-e-Shahadat Order, 1984 which states:

40. How much of information received from accused may be proved. When any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

Law enunciated in “Mst. ASKAR JAN and others Vs. MUHAMMAD DAUD and others” (2010 SCMR 1604) “Thus, firstly there should be an information or statement of the accused whether it may be confession or otherwise and that too when he was in police custody and secondly on the basis of such information or statement a fact is discovered. If there is no statement of the accused or information given to the Police, which is an essential requirement of the Article, then the subsequent discovery would become inconsequential. Further such information either oral or recorded by the police is required to be proved by the prosecution through evidence.”

19. The chain of events as recorded by the prosecution through its witnesses is flawless and natural, leaving no place of doubt.

20. For what has been discussed above, we are of the considered view that the judgment of learned Trial Court is well-reasoned and does not need any intervention. Therefore, the conviction recorded and sentence of death awarded to the appellants Ali Muhammad and Najeebullah by the learned trial court vide judgment dated 19.11.2019 is maintained. The appeals filed by the convicts-appellants, without any substance, as such are dismissed.

21. Resultantly, Criminal Murder Reference No.01-I of 2019 is answered in the AFFIRMATIVE and confirmed.

JUSTICE DR. SYED MUHAMMAD ANWER

JUSTICE MUHAMMAD NOOR MESKANZAI
CHIEF JUSTICE

JUSTICE KHADIM HUSSAIN M. SHAIKH

Announced in Open Court
On 30.04.2021 at Islamabad
*Mubashir**