IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Mr. Justice Qazi Faez Isa
Mr. Justice Sardar Tariq Masood

JAIL PETITION NO. 462 OF 2016
(On appeal against the judgment dated 23-06-2016 passed by the Lahore High Court, Rawalpindi Bench, in Criminal Appeal No.01-J/2013 and Murder Reference No.01/2013)

Javed Akhtar ... ... *Petitioner*

Versus

The State ... ... *Respondent*

For the Petitioner : Mr. M. Rizwan Ibrahim Satti, ASC

For the State : Mirza Abid Majeed,
Deputy Prosecutor General, Punjab.

Date of hearing : 04.06.2020.

O R D E R

Qazi Faez Isa, J. This petition has been submitted through jail by the petitioner-convict who is unrepresented, therefore, we had appointed Mr. Muhammad Rizwan Ibrahim Satti, learned ASC, on 13 May 2020 to represent him at State expense.

2. The petitioner is the sole accused nominated in FIR No. 94 which was registered at police station Gujar Khan, District Rawalpindi on 17 February 2011 at 11.10 am in respect of a crime committed earlier the same day at 8.30 am. The complainant, Ilyas Mehmood (PW-9), reported that his paternal uncle, the petitioner, had in a fit of rage killed the complainant's elder brother Muhammad Riaz and injured the complainant (PW-9), his sister-in-law Mst. Nayera Perveen (PW-11) and his nephew Ikram Waris (PW-12). The petitioner was tried by the learned Additional Sessions Judge, Gujar Khan ('**ASJ**') and was convicted under section 302(b) of the Pakistan Penal Code ('**PPC**') for the *qatl-i-amd* of Riaz Mehmood ('**the deceased**'). The petitioner was sentenced to death and was directed to pay compensation to the legal heirs of the deceased of an amount of two hundred thousand rupees and in default to undergo six months simple imprisonment. He was also convicted under section 324 PPC for the attempted *qatl-i-amd*

of Ilyas Mehmood (PW-9), sentenced to five years imprisonment and ordered to pay *daman* of fifty thousand rupees on account of each injury under section 337-F(iii) PPC. For injuring Nayera Perveen (PW-11) and Ikram Waris (PW-12) he was convicted under section 337-F(iii) and directed to pay *daman* of fifty thousand rupees for each injury caused to them. All the sentences were ordered to run concurrently and the period of incarceration undergone by him before conviction was reduced from his sentences after his conviction by extending him the benefit of section 382-B of the Code of Criminal Procedure ('**Code**').

3. Learned counsel representing the petitioner submits that there are material contradictions between the ocular account and the medical evidence and in this regard has referred to the testimony of Dr. Muhammad Amir Shahzad (PW-5) who had noted that the injuries suffered by Ilyas Mehmood (PW-9) show blackening which could only have been caused if he was fired from a distance of less than one meter. Learned counsel has also referred to the site plan (exhibit PF) and has, at some length, tried to demonstrate the contradiction in the prosecution case with regard to where the petitioner stood in relation to the deceased and the injured and their respective distances. He further submits that the prosecution case is that the petitioner fired four times, from a single barrel 12 bore shotgun, which did not tally with the number of spent cartridges recovered from the crime scene which were only three. He next submits that the spent cartridges and the crime weapon were sent together for forensic examination which rendered the forensic result inconsequential. Without prejudice to the petitioner's case on merits the learned counsel submits that the petitioner was entitled to the benefit of section 302(c) PPC as there was no pre-meditation on his part and as he had acted on the spur of the moment on account of grave and sudden provocation.

4. The learned Deputy Prosecution General ('**DPG**') states that in an uncontrolled fit of rage the petitioner had brutally killed the deceased and seriously injured his relatives, who had testified against him. He submits that there was sufficient irrefutable evidence against the petitioner and the prosecution had

established its case against him beyond reasonable doubt. The learned Judges of the High Court had reduced the petitioner's death sentence under section 302(b) PPC to imprisonment for life because the motive was not established and the stated recovery of the firearm was rendered inconsequential. However, he submits that this was not done in accordance with the applicable principles and the petitioner managed to secure a benefit to which he was not entitled to and that he is not entitled to any further relief.

5. We have heard the learned counsel and with their able assistance examined the paper-book. Three injured persons testified against the petitioner, namely Ilyas Mehmood (PW-9), Ms. Nayera Perveen (PW-11) and Ikram Waris (PW-12) and all of them consistently maintained that they were fired on by the petitioner and that the petitioner had also fired on the deceased and killed him. The contention of the learned counsel as regards the blackening on the injuries of one person out of the four who were fired upon does not discount the prosecution case as it is not expected that they and the petitioner would remain static at one place while the petitioner was firing on them. It is but natural that alarm and mayhem would have resulted and the injured would have run to save themselves from the petitioner and the petitioner was pursuing them. However, the site plan does not record a fluid situation and freezes action at just one point in time. Merely because one of the injured persons had blackening on his wound, and in an enclosed place, does not undermine his testimony or that of the other injured witnesses, let alone discredit them.

6. Blackening on one wound of one of the injured meant that this person was in closer proximity to the petitioner when he was fired upon. As regards the doctor giving his opinion regarding the distance from which a fire from a shotgun would leave blackening we have some reservations. A medical doctor can of course state whether there was blackening on a wound but may not be qualified to determine the distance from which the fire was made, which comes within the expertise of a firearm forensic expert, who may consider a number of factors, including the type of firearm and cartridge that had been used.

7. The contention of the learned counsel that only three (and not four) spent cartridges were recovered from the crime scene is explained by the fact that a single barrel shotgun was used by the petitioner and it was of the kind that did not eject fired and spent cartridges. Since the crime weapon was a single barrel shotgun it meant that after the petitioner fired once he would have to reload it to fire again and to repeat this action. The last fired cartridge would be left in the barrel and not ejected and left at the crime scene for subsequent retrieval.

8. We have reservations with regard to the learned Judges of the High Court disregarding the Forensic Science Laboratory, Punjab, Lahore's forensic report (exhibit PV) by designating it as 'inconsequential', by saying that the spent cartridges were sent together with the crime weapon for forensic examination. The petitioner was arrested on 18 February 2011, the very next day of having committed the crime. It was not reasonable to expect that the spent cartridges would be sent by the police immediately and on the very day that the crime was committed. The petitioner was arrested the next date and the crime weapon was sent together with the spent cartridges. In view of the very limited time available to the police it cannot be assumed, as it appears to have been done by the learned Judges, that after recovering the firearm it was fired to obtain spent cartridges to link them with the crime.

9. The other reason which prevailed with the learned Judges to reduce the sentence of death to one of imprisonment for life was that the motive set forth by the prosecution, that there had been an altercation amongst the members of the family, was not established, because there was no independent witness to testify to this. In our opinion this was not a sufficient reason to discard the motive. It is rare that a domestic dispute would be witnessed by outsiders. Therefore, to say that because there was no outsider to testify the motive is not established is in our opinion not the correct approach.

10. We now address the contention of the petitioner's learned counsel that the facts and the circumstances of the case brought it within the parameters of section 302(c) PPC which does not

prescribe a minimum punishment and the maximum punishment under this provision is twenty-five years. He also contends that the sentence awarded to the petitioner merits reduction. In this regard his submissions are twofold, firstly, that there was no element of pre-meditation by the petitioner, and secondly, the crime was committed as a consequence of grave and sudden provocation. However, neither of these factors nor any others are mentioned in section 302(c) PPC. Section 302 (excluding its provisions, which are not relevant for the purpose of this case) provides, that:

> 302. *Punishment of qatl-i-amd*. Whoever commits *qatl-i-amd* shall, subject to the provisions of this Chapter, be-
>
> (a) punished with death as *qisas*;
>
> (b) punished with death or imprisonment for life as *ta'zir* having regard to the facts and circumstances of the case, if the proof in either of the forms specified in section 304 is not available; or
>
> (c) punished with imprisonment of either description for a term which may extend to twenty-five years, where according to the Injunctions of Islam the punishment of *qisas* is not applicable.

The precursor of these provisions was the erstwhile section 300 of the PPC, which was more comprehensive and nuanced, providing different categories, illustrations and a number of exceptions. *Ali Muhammad v The State* (PLD 1996 Supreme Court 274) is the seminal judgment authored by Fazal Karim, J, one of the most logical, lucid and coherent judicial minds who had the added gift of articulation, held, that section 302(c) PPC covers those cases which came within any one of the five listed exceptions of the erstwhile section 300 PPC:

> Section 302 of the P.P.C. therefore, itself contemplates plainly clearly a category of cases which are within the definition of *Qatl-i-Amd* but for which the punishment can, under the Islamic Law, be one other than death or life imprisonment. As to what are the cases falling under clause (c) of section 302, the law-maker has left it to the Courts to decide on a case to case basis. But keeping in mind the majority view in Gul Hassan case PLD 1989 SC 633, there should be no doubt that the cases covered by the Exception to the old section 300, P.P.C. read with the old section 304 thereof, are cases which were intended to be dealt with under clause (c) of the new section 302 of the P.P.C. (at pages 290-291)

11. In the present case the learned counsel for the petitioner relies on Exceptions 1 and 4 of the erstwhile section 300 PPC. Exception 1 attends to the case of an offender who is '*deprived of the power of self-control by grave and sudden provocation*'. If for the sake of argument it be accepted that the petitioner had been deprived of the power of self-control by grave and sudden provocation but by going to fetch his shotgun broke or should have dissipated the purported loss of the *power of self-control*. Moreover, loss of self-control may at best account for the first fire made by the petitioner. But, then the petitioner opened the shotgun, removed the spent cartridge, took out a loaded cartridge, inserted it in the barrel, aimed and fired, and repeated this action thrice. To attract the said exception there must also be some evidence of what had happened that caused *sudden provocation*. In this case there is none. On the contrary the petitioner got the benefit of a reduced sentence because the motive had not been proved. Motive suggests pre-meditation whereas *sudden provocation* tends to exclude it. The petitioner cannot say that, because motive was not established he should get the benefit of a reduced sentence and then go on to say that he was provoked, which brings back an element of motive. In any event there is nothing on record to suggest that the petitioner had been suddenly provoked. Therefore, Exception 1 of the erstwhile section 300 is not attracted to the facts of this case.

12. Exception 4 of the erstwhile section 300 covered those cases where an offender causes death '*without premeditation in a sudden flight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner*'. In *Muhammad Asif v Muhammad Akhtar* (2016 SCMR 2035) it was held in relation to Exception 4, that:

> In order to attract provisions of Exception 4 to the erstwhile section 300, P.P.C it had not only to be established that the case was one of a sudden fight taking place without any premeditation in the heat of passion upon a sudden quarrel but it was also required as a necessary ingredient that the offender must not have taken undue advantage or must not have acted in a cruel or unusual manner. (at page 2038)

In the present case there is no evidence of a *sudden fight*, let alone a *in the heat of passion*. The petitioner armed himself with a shotgun against unarmed persons, this in itself constitutes *undue advantage* and excludes his case from the purview of the Exception 4. He also acted in a most *cruel manner* which is yet another factor that makes him ineligible for the benefit of the said exception. Neither of the two cited Exceptions apply. The petitioner after the altercation went to fetch a shotgun. He loaded it and fired it. He then reloaded and re-fired it thrice more, which demonstrates extreme cruelty and brutality. There is no factual basis to bring the petitioner's case under section 302(c) PPC.

13. The learned ASJ had convicted the petitioner and had sentenced him to death. The learned Judges of the High Court upheld the conviction of the petitioner but were persuaded to reduce his death sentence to one of imprisonment for life on grounds which were not tenable. However, since the complainant's side and the State were satisfied, and did not seek to have the death penalty given by the learned ASJ restored, this aspect is of academic interest. We have examined the record and are satisfied that the prosecution had established its case against the petitioner beyond reasonable doubt and the convictions of the petitioner were justified. The learned ASJ had sentenced the petitioner to death for the *qatl-i-amd* of the deceased and the learned Judges of the High Court reduced his sentence to imprisonment for life. The petitioner managed to secure the benefit of the alternative and reduced sentence despite the brutal manner in which he pursued his victims, killed one and seriously injured three others. The sentences awarded to him were also ordered to run concurrently and the benefit of section 382-B of the Code was extended to him.

14. For the reasons mentioned above leave to appeal is declined and this petition is dismissed.

Judge

Judge

Bench-III
Islamabad
04-06-2020
(M. Saeed)

Approved for Reporting