

JUDGMENT

ATHAR MINALLAH, C.J.---Through this consolidated judgment, we will decide Jail Appeal No.129/2013 titled 'Haroon-ur Rashid and 3 others v. The State', and answer the Capital Sentence Reference No.01-T/2013.

2. The facts, in brief, are that according to the prosecution, on 01-03-2011, Ghulam Abbas ASI (PW-12) along with other police officials visited the area known as Maira Aku for conducting investigations of a criminal case i.e. FIR No.46/2011, dated 01-03-2011, registered under section 506 of the Pakistan Penal Code, 1860 (hereinafter referred to as the 'P.P.C.'). After recording the statement of the complainant's son, namely Naseer Ullah, the said police officials went to the house of the persons who were stated to be nominated as the accused. Ghulam Abbas, ASI (PW-12) was accompanied by two Constables, namely, Khalid Mehmood and Gulzar Ahmed. Later Muhammad Hanif, Constable, who was living in the vicinity, also joined them. They reached the house of the crime scene at about 07:20 p.m. and answering the knock on the door, two persons came out who were later identified as Dawood Akhtar, son of Muhammad Nawaz and Muhammad Haroon, son of Muhammad Nawaz. The latter had an altercation with the police officials and in the meanwhile Muhammad Asim, son of Muhammad Nawaz and Muhammad Israr, son of Muhammad Nawaz, who were armed with .30 bore firearm weapons, also arrived at the crime scene. Muhammad Asim fired at Gulzar Ahmed, Constable (hereafter referred to as the 'Deceased'), as a result whereof he received a firearm injury and fell down. The Deceased succumbed to his injuries. Muhammad Asim and Muhammad Israr fled from the crime scene while Muhammad Dawood and Muhammad Haroon were arrested. Ghulam Abbas, ASI informed the Police Station and, pursuant thereto, Nusrat Ali, Sub-Inspector, reached the crime scene along with Khalid Javed, ASI, Muhammad Ishfaq, ASI, Rizwan, Constable, Muhammad Saleem, Constable, Ishfaq Ahmed, Constable and Shakeel Abbas, Constable. Nusrat Ali, Sub-Inspector (PW-10) recorded the statement/complaint i.e. Exh.P-C and sent it to the Police Station for registration of a criminal case. Consequently, FIR No.47, dated 01-03-2011 (Exh.P-C/1) was registered at Police Station GoIra Sharif, Islamabad (hereinafter referred to as the 'FIR'). The body of the Deceased was sent to the Pakistan Institute of Medical Sciences, Islamabad (hereinafter referred to as the 'Hospital') for conducting an autopsy. The autopsy was conducted by Dr. Muhammad Farrukh Kamal, Medico-Legal Officer (PW-7) pursuant to an application (Ex.P-K/1). The Inquest Report (Exh.P-K/2) was prepared by Nusrat Ali, Sub-Inspector (PW-10). After a while, Ghulam Qasim, Inspector (PW-11) also reached the crime scene with other police officials. He prepared a rough site plan (Exh.P-N) and collected blood stained earth and eight empties fired from a .30 bore firearm weapon vide recovery memos Exh.P-D, Exh.P-E, respectively. A memo of identification of the body of the Deceased (Exh.P-A) was prepared. On 02-03-2011, Dawood Akhtar and Muhammad Haroon were produced before the learned trial Court. On 03-03-2011, Muhammad Asim and Muhammad Israr were also arrested. On 09-03-2011, during the course of investigations, Muhammad Asim led the Investigating Officer to the recovery of a .30 bore pistol which was taken into possession vide recovery memo (Exh.P-H). Since a licence could not be produced, therefore, a separate criminal case was registered. On the same day i.e. 09-03-2011, Muhammad Israr also led the Investigating Officer to the recovery of a 30 bore firearm weapon which was taken into possession vide recovery memo (Exh.P-J). The investigations were completed on 16-03-2011 and a report under section 173 of the Code of Criminal Procedure, 1898 (hereinafter referred to as the 'Cr.P.C.') was duly submitted before the learned trial Court. It is noted that the crime empties were sent to the Forensic Science Laboratory Punjab, Lahore (hereinafter referred to as the 'Laboratory') on 10-03-2011 while the recovered firearm weapons were sent on 11-04-2011. The Laboratory submitted its report, dated 21-07-2011 (Exh.P-S) wherein it was confirmed that the empties had been fired from the recovered firearm weapons. A charge was framed vide order, dated 14-04-2011, against Haroon ur Rashid, son of Muhammad Nawaz, Dawood Akhtar, son of Muhammad Nawaz, Muhammad Asim, son of Muhammad Nawaz and Israr Ahmed, son of Muhammad Nawaz. The appellants did not plead guilty. It is noted that the appellants are siblings and the crime scene was the house where Muhammad Asim, son of Muhammad Nawaz, was living. The prosecution produced fourteen witnesses. The appellants preferred not to be examined under oath and, therefore, their statements were recorded under section 342 of Cr.P.C. All the

appellants, except Muhammad Asim, son of Muhammad Nawaz, had stated in their statements that they were not present at the time of occurrence. Muhammad Asim, son of Muhammad Nawaz, however, took the plea that he had shot at the Deceased in self-defence. Three witnesses had entered the witness box in support of the defence while Ashfaq Anwar, ASI had deposed as a Court Witness. After the recording of evidence and affording an opportunity of hearing to the parties, the learned Judge Special Court (Anti-Terrorism), Islamabad, convicted and sentenced all four appellants in the terms described in paragraphs 59 and 60 of the impugned judgment, dated 19-12-2011. Muhammad Asim, son of Muhammad Nawaz, was handed down the death sentence while the other three appellants were sentenced to life imprisonment. Fines were also imposed on the appellants.

3. The learned Counsel, who has appeared on behalf of Muhammad Asim, son of Muhammad Nawaz has argued that; it is settled law that the entire statement recorded under section 342 of the Cr.P.C. has to be believed and relied upon and that selective reliance on parts thereof is not permissible; the recovery of firearm weapons from two appellants could not be proved by the prosecution; the empties recovered from the crime scene were sent to the Laboratory after the firearm weapons had been recovered; the Laboratory report, therefore, cannot be relied upon; material discrepancies in the testimonies of the witnesses raise sufficient doubts warranting acquittal; the ocular evidence is neither trustworthy nor inspires confidence; the provisions of the Anti-Terrorism Act, 1997 (hereinafter referred to as the 'Act of 1997') are not attracted; the prosecution has failed to prove its case beyond a reasonable doubt; Hanif Bhutta, Constable (PW-14), could not have been treated as a chance witness because he had not given a satisfactory explanation regarding his presence at the crime scene; the learned Counsel has placed reliance on the cases of 'Tahir Mehmood alias Achoo v. The State and another' [2018 SCMR 169], 'Waris Ali and 5 others v. The State' [2017 SCMR 1572], 'Kashif Ali v. The Judge, Anti-Terrorism, Court No.II, Lahore and others' [PLD 2016 SC 951], 'Muhammad Ilyas v. Muhammad Abid alias Billa and others' [2017 SCMR 54], 'Ali Sher and others v. The State' [2008 SCMR 707], 'Muhammad Akbar v. The State' [2008 SCMR 1064], 'Muhammad Irshad v. Allah Ditta and others' [2017 SCMR 142], 'Liaquat Ali v. The State' [2008 SCMR 95], 'Mst. Rukhsana Begum and others v. Sajjad and others' [2017 SCMR 596], 'Muhammad Mansha v. The State' [2018 SCMR 772], 'Abdul Jabbar and another v. The State' [2019 SCMR 129], 'Ghulam Mohy -ud-Din alias Haji Babu and others v. The State' [2014 SCMR 1034], 'Azhar Iqbal v. The State' [2013 SCMR 383], 'Wajahat Ahmed and others v. The State and others' [2016 SCMR 2073], 'Iftikhar Ahmed v. The State and others' [2014 SCMR 7] and 'Osman alias Kaloo v. The State' [2017 SCMR 622].

4. The learned Counsels who have appeared on behalf of the other appellants have argued that; the presence of the appellants at the time of occurrence could not be proved by the prosecution; the prosecution story is not trustworthy; the persons who were stated to be present at the time of occurrence were deliberately withheld; no role has been attributed to Dawood Akhtar and Muhammad Haroon, except that they had an altercation with the police officials; the prosecution failed to prove its case beyond reasonable doubt.

5. The learned counsel who has appeared on behalf of the complainant has contended that; the prosecution had established its case beyond reasonable doubt by bringing on record reliable, trustworthy and confidence inspiring evidence.

6. The learned State counsel has adopted the arguments raised by the learned Counsel for the Complainant.

7. The learned counsel for the parties and the learned State Counsel have been heard and the record perused with their able assistance.

8. According to the prosecution, Ghulam Abbas, ASI (PW-12), had visited the area in connection with investigations relating to a criminal case. The testimonies of the prosecution witnesses confirm that neither the Deceased nor the other officials were in uniform. Ghulam Abbas, ASI (PW-12), through his testimony was unable to establish, by bring on record cogent and trustworthy evidence, that he had left the Police Station and that his presence at the crime scene was in connection with the investigations of a criminal case. There is also nothing on record to show that the appellants were nominated as accused in the criminal case which was being investigated. It also does not appeal to a reasonable prudent mind that while two of the

appellants had managed to flee the crime scene the other two were arrested without resistance. To the extent of Dawood Akhtar and Muhammad Haroon, the prosecution has failed to bring on record any reliable, confidence inspiring and unimpeachable evidence to prove their involvement in the commission of the offence and same is the case of Muhammad Israr. The latter is alleged to have reached the crime scene with Muhammad Asim and the role attributed to him was confined to firing from a firearm weapon. The weapons were recovered on 09-03-2011, while the empties were sent to the Laboratory the next day i.e. on 10-03-2011. There is no explanation for the delay in sending the crime empties nor as to why they were sent the day following the recovery of the firearm weapons. The learned counsel for the appellants have rightly placed reliance on the judgments rendered by the august Supreme Court in support of their contention that in such an eventuality it would not be in consonance with the principles of safe administration of criminal justice to place reliance on the report of the Laboratory. The ocular evidence brought on record by way of depositions of Ghulam Abbas, ASI (PW-12), Khalid Pervez, Constable (PW-13) and Hanif Bhutta, Constable (PW-14) also do not inspire confidence. The other witnesses, who were stated to be present at the time of occurrence, were given up and in this regard reasons have not been provided by the prosecution. We are, therefore, of the view that the prosecution could not prove the guilt of Dawood Akhtar, son of Muhammad Nawaz, Muhammad Haroon, son of Muhammad Nawaz and Muhammad Israr, son of Muhammad Nawaz beyond reasonable doubt.

9. The case of Muhammad Asim, son of Muhammad Nawaz is distinct because the latter had taken the plea of self-defence in his statement recorded under section 342 of the Cr.P.C. It is not the case of Muhammad Asim, son of Muhammad Nawaz, that the Deceased was holding a firearm weapon in order to apprehend or had reason to believe that there was imminent danger or threat of being fired upon. According to his own version, while he was grappling with the Deceased, he felt as though the latter was reaching to pull out a firearm weapon. There is nothing on record to show that the Deceased was armed with a firearm weapon at the time of the commission of the offence. In the case titled 'Muhammad Javed v. The State' [1996 SCMR 962], the petitioner in that case had admitted his presence and causing injuries to the deceased in his statement recorded under section 342 of the Cr.P.C. The august Supreme Court observed that since the petitioner could not prove the plea of self-defence, therefore, the High Court had rightly discarded the said defence. In the case titled 'Navid Akhtar and others v. Muhammad Saeed Khan and another' [2004 SCMR 1469], the plea of self-defence was taken by the accused but he had failed to discharge the onus by bringing on record cogent and reliable evidence. He had also preferred not to be examined under oath under section 340(2) of the Cr.P.C. in order to disprove the charges or allegations against him. In the case titled 'Nazim alias Nazer Biswas v. The Crown' [1969 PCr.LJ 1138] it has been held that if a Court is satisfied that a case of right of self-defence is made out, then whether it has been exceeded or not would be a relevant factor to be considered. It is further noted that if a plea of self-defence has not been explicitly taken during the trial, either in the statement recorded under section 342 of the Cr.P.C. or at the time of cross-examining the prosecution witnesses, yet it remains open to the Court to infer the same from evidence led during the trial. Reliance in this regard has been placed on the case of 'Mushtaq Hussain and another v. The State' [2011 SCMR 45]. It is settled law that each criminal case has to be decided on the basis of evidence led in that case. Each case depends upon the facts and circumstances of that case and evidence produced by the parties therein. The prosecution has to prove the case and if the defence takes a plea it has to be considered and both versions have to be put in juxtaposition in order to arrive at a just and proper conclusion. It is obvious, therefore, that when an accused explicitly takes the plea of self-defence, then the onus to prove its existence would be on the latter.

10. In the facts and circumstances of the case in hand, the explicit plea taken by Muhammad Asim, son of Muhammad Nawaz, has remained unsubstantiated. Admittedly, the Deceased was not holding a firearm weapon when Muhammad Asim had confronted him, or even when he was grappling with him. It is also an admitted position that the injuries to which the deceased had succumbed were solely attributed to firing from a firearm weapon by Muhammad Asim, son of Muhammad Nawaz. It is admitted that three shots were fired from the firearm weapon used by Muhammad Asim, causing fatal injuries to the Deceased. Even if it is assumed for the sake of argument that it was a case of self-defence, yet in the facts and circumstances of this

case Mohammad Asim had had definitely exceeded the threshold. However, we are of the opinion and satisfied, after carefully examining the record, that Mohammad Asim could not prove that he had acted in self-defence. The Deceased was admittedly not holding a weapon nor was it seen by Mohammad Asim and, therefore, the plea of having acted in self-defence was without any basis. Mohammad Asim had admittedly shot the Deceased three times and he was not successful in making out a case of having acted in self-defence. The admission made by Mohammad Asim is corroborated by the complaint and other evidence brought on record. We have not been able to persuade ourselves to interfere with the findings of the learned trial Court to the extent of Mohammad Asim.

11. For what has been discussed above, we answer the Capital Sentence Reference No.01 - T/2013 in the affirmative. The instant appeal to the extent of Muhammad Asim son of Muhammad Nawaz is dismissed and allowed in relation to the other appellants i.e. Dawood Akhtar, son of Muhammad Nawaz, Israr Ahmed son of Muhammad Nawaz and Haroon-ur-Rashid, son of Muhammad Nawaz, because the prosecution had failed to bring on record trustworthy, consistent and unimpeachable evidence on record to prove their guilt beyond a reasonable doubt. The latter three are, therefore, acquitted of the charges framed by the learned trial Court. Since Israr Ahmed son of Muhammad Nawaz is on bail, his sureties are discharged from the liability. Haroon-ur-Rasheed son of Muhammad Nawaz and Dawood Akhtar son of Muhammad Nawaz are in custody. They be released from the prison forthwith if not required to be incarcerated in any other case.

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