

JUDGMENT

FIAZ AHMAD ANJUM JANDRAN, J --- Through this single judgment, we intend to decide listed Murder Reference and criminal appeals, which have arisen out of judgment dated 02.05.2019, passed by the learned Additional Sessions Judge-IV Islamabad-East, whereby appellants (Abdul Hassan, Syed Sajjad Hussain and Haider Abbas) were convicted in FIR No. 60, dated 05.06.2013, under sections 302, 324/34, 337-F(ii), 337-F(iii), 337-C, 119, P.P.C, Police Station Banni Gala, Islamabad and sentenced as under (under Section 395 P.P.C appellants were acquitted):--

Under section 302(b) P.P.C.	death on three counts each with fine of Rs.3,00,000/- each as compensation to the legal heirs of every deceased, in default to undergo six months S.I.
Under section 324 P.P.C.	seven years R.I. with fine of Rs.1,00,000/- each as compensation to the legal heirs of every deceased, in default to undergo six months S.I.
Under section 337-F(ii) P.P.C.	one year R.I. with Daman of Rs.50,000/- each to be paid to every injured.
Under section 337-F(iii) P.P.C.	one year R.I. with Daman of Rs.50,000/- each to be paid to every injured,
Under section 337-D P.P.C.	seven years R.I. with 1/3rd share of Diyat to every injured.

2. The law in the case was set in motion by PW-12/ complainant Zubair Akhtar vide a written application dated 05.06.2013, Ex.PA, on the basis of which formal FIR Ex.PC/1 was registered wherein it was alleged that he is resident of village Jigiot, Police Station Banni Gala, Islamabad; that at about 09:30 am, he along with nephew Adnan was heading towards their jeweler shop situated at Athal Chowk Bharakahu, on Toyota Corolla GLI No. RIA 1270; that ahead of them was his elder brother Gulzeb aged about 50 years with three sons Gul Safeen aged 25/26 years, Shahzeb aged 20/21 years, Jahanzeb aged 20/21 years and gunmen Mushtaq, Tufail, Amir Hussain, aged 60, 30 and 24/25 years respectively on their Toyota Land Cruiser Swat-B/ 1081 being driven by Shahzeb; that when they reached at Sewra bridge, a white colour Toyota XLI bearing No.821 intercepted the car of his brother out of which three persons armed with Kalashnikov and .30 bore pistol alighted and started reckless firing due to which his brother Gulzeb and the two guards Mushtaq and Tufail died at the spot while his three nephews and guard Amir Hussain sustained injuries; that the assailants then fled away on their car; that besides the complainant, the occurrence was witnessed by his nephews Shahzeb, Jahanzeb, Gul Safeen, Adnan and Amir; that he can identify the assailants and that they have bloodshed enmity in the village. After due investigation, appellants were challaned to face the trial.

3. In order to prove its case, the prosecution produced twenty witnesses in all that includes injured/eye-witnesses Gul Safeen Zargar PW-9, Jahanzeb Gul Zargar PW-10, Shahzeb Gul Zargar PW-11 and complainant Zubair Akhtar PW-12 while PW-13 Dr. Tanvir Afsar Malik had given the details of medical examination of the injured Jahanzeb, Shahzeb, Amir Abbas. The said witness also conducted autopsy on the dead bodies of deceased Gulzeb, Tufail Khan, Mushtaq Hussain. PW-18 Abdul Sattar SI had given the details of investigation conducted by him. After the recording of prosecution evidence, appellants were examined in terms of Section 342 of the Criminal Procedure Code wherein they denied the allegations/prosecution evidence. The learned trial Court after hearing arguments, convicted and sentenced the appellants as mentioned in para No.1 supra.

4. Learned counsel for the appellants contended that the occurrence is blind and no one is nominated in the FIR, when one Mazhar who was acquitted by the trial Court alleged to be facilitating the accused then on the same analogy, appellants were also liable to be acquitted. That motive has been shifted by assertion that accused looted amount from the vehicle a bag wherein gold ornaments and cash was there while no such recovery is on record, impugned judgment is liable to be set-aside. That from record, it could be safely suggested that complainant was not at the crime scene.

5. On the other hand, learned counsel for the complainant has argued that brutal incident was reported wherein three individuals lost their lives. That PWs. 9, 10 and 11 are the injured witnesses who saw the occurrence with their naked eyes and there was sufficient time to recognize them and on the basis of said recognition, said witnesses identified the accused/appellant in identification parade. There is no room for acquittal of the appellants. At the end, learned counsel argued that if at all, this Court comes to the conclusion that case for awarding death penalty is not made out, then at least lesser punishment could be granted but there is no yardstick which could suggest that case of the acquittal is made out in favour of the appellants/ accused.

6. Heard the learned counsel for the appellants, learned counsel for the complainant, learned State Counsel and examined the record with their able assistance.

7. Careful judicial examination of the available material/ evidence has been made and it has been noticed that case at hand is a broad daylight occurrence which took place on 05.06.2013 at 09:30 a.m., same was reported to the police by way of an application Ex.PA at 12:30 noon, wherein formal FIR, Ex.PC/1 was registered at 01:00 p.m., deceased and injured were shifted to the hospital by PW 12 Zubair Akhtar, in the same vehicle Land Cruiser No.SWAT-B 1081 Ex.PD in which deceased were done to death and remaining sustained injuries, distance from the place of occurrence to hospital is 22 km, keeping in view the time of occurrence, the place of occurrence, duration of occurrence, distance from the place of occurrence to the hospital and initial formalities regarding dead/injured persons in the hospital, we hold that in peculiar circumstances FIR was promptly lodged and there was no delay in reporting the matter to the police, injured witnesses were the natural witnesses of the occurrence, whose presence could not be doubted in any manner while one injured witness remained hospitalized for ten days.

8. It is noticed that brutal firing was made by the accused/appellants where three persons lost their lives and assailants remained there for 5/7 minutes, said duration was sufficient to recognize the accused/appellants. The witnesses Gul Safeen Zargar (PW-9), Jahanzeb Gul Zargar (PW-10) and Shahzeb Gul Zargar (PW-11) are injured/eye-witnesses who were also severely injured due to reckless firing by the accused persons.

9. The factum of the statement of the injured/eye-witnesses i.e. PWs 9, 10 and 11 is duly supported by the important piece of evidence i.e. test identification parade duly conducted under the magisterial supervision. Said Magistrate appeared as PW-17 who fully testified the test identification parade. No major discrepancy was pointed out. There is no flaw which could shatter the authenticity and genuineness of the said test identification parade. Mere an objection had been taken, that too as objection for the sake of objection, that accused were previously shown to the witnesses by the I.O., but there is no piece of evidence which could substantiate the assertion of the accused/appellants. This important piece of evidence could not be brushed aside.

10. Relevant law on the subject of identification parade is Article 22 of the Qanun Shahadat Order 1984, which for ease of reference is reproduced hereunder:-

"22. Facts necessary to explain or introduce relevant facts: Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue, or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose."

The above reproduction explicitly provides that necessary facts for the purposes of explaining or introducing a fact in issue or to rebut an inference suggested are always considered as relevant insofar as they are necessary for the required purpose.

11. The Hon'ble Supreme Court of Pakistan in a recent judgment reported as "Tasar Mehmood and another v. The State and others" (2020 SCMR 1013) has held in paragraph-4 as under:-

"Spot inspection confirmed the incident. Integrity of initial investigation is beyond doubt and it is through investigative process that the police reached out the petitioners; they were kept in judicial lock up and remitted into police custody only after they had been identified by the injured in the test identification parade. Weapons recovered pursuant to disclosures were forensically matched with the casings dis-patched earlier than petitioners' arrest. These formidable pieces of evidence were relied upon by the trial court to unhesitatingly return a guilty verdict. Composition of murder of co-accused by Tasar Mehmood in the High Court has been nothing less than a last straw in the episode. In this backdrop, criticism of alleged flaws in the test identification parade sounds a far cry. Reference to omission of assailants' features and respective roles played by them during the occurrence is beside the point in circumstances.

Juridical wisdom, legislated with ingenious brevity par excellence, is nonetheless widely spaced to meet diverse situations as calamities seldom come about under ideal or identical circumstances; same applies to the responses by those who encounter such situations as crisis impacts differently upon individuals' faculties and nerves to sustain and endure themselves during the ordeal, therefore, it would be unrealistically inexpedient to apply dogmatic standards with empirical exactitude to settle the question of assailant's identity. There may be situations where witnesses are expected to be more expressive and descriptive but there may well be contra situations as well. The underlying purpose behind High Court Rules and Orders, Volume III, Part-C, based upon a circular issued by the Punjab Government way back on 19th of December, 1936 is primarily to ensure that the accused confronting the witnesses in a test identification exercise is least embarrassed or handicapped. Similarly, Rule 26.32 of the Police Rules, 1934, inter alia, provides as under:-

(a) "The proceedings shall be conducted in the presence of a magistrate or gazetted police officer, or, if the case is of great urgency and no such officer is available, in the presence of two or more respectable witnesses not interested in the case, who should be asked to satisfy themselves that the identification has been conducted under conditions precluding collusion."

The survey of above provision of law renders it abundantly clear that the process of test identification parade has to be essentially carried out, having regard to the exigencies of each case, in a fair and non-collusive manner, free from the taints of prejudice; a contra claim must rest upon evidential basis; the exercise is not an immutable ritual, inconsequential non performance whereof, may cause failure of prosecution case, otherwise structured upon clean and probable evidence. In the present case, the assailants surprised the witnesses and soon thereafter started snatching the valuables; upon resistance, one of them resorted to firing; a colleague fell to death on spot at the hands of his own accomplice and as such their identification by the witnesses constituted valid and reliable proof to drive home the charge beyond reasonable doubt. The complainant or the witnesses in their statements did not point out specific features and as such they were not required to improve upon their case during the test identification parade. An effective regime of administration of criminal justice has to be pivoted on a balance, correlating fair trial for an accused with a meaningful opportunity to the prosecution to drive home the charge on the strength of available evidence. Since corporal consequences are irreversible and freedom once forfeited cannot be restored or recompensed with retrospect, the Court must insist for "proof beyond doubt" to rule out possibility of error or hypothesis of innocence, nonetheless, at the same time, prosecution cannot be saddled to come forward with details hyper technical, artificial or illusory. Indictment structured on macro foundations of truthful evidence can sustain the charge." [Emphasis added]

12. Similarly, the Hon'ble Apex Court of the land in another recent judgment reported as "Muhammad Siddique and others v. The State" (2020 SCMR 342) has expounded the law on the subject in the following terms:-

"The above framework provides enough space to admit evidence in prosecution of

offenders previously unacquainted with the victims of the witness; appraisal of such evidence is subject to same principles as are universally applicable to any piece of evidence, under consideration in a criminal trial; there are no additional barricades as is evidence from the plain reading of the Article *ibid*; without prejudice to the safeguards available to an accused at each stage of trial, essentially fair as guaranteed under the Constitution, nonetheless, it does not cast an artificially heavier onus on the prosecution to meet standards of proof beyond human capacity."

13. The facts of the case at hand are examined in the light of referred recent law, expounded by the Hon'ble Apex Court of the land, along with statement of injured witnesses, who duly identified the accused/appellants during the test identification parade. It is observed that there is nothing available on record which could lead to frame the view that before test identification parade accused/ appellants remained in police custody and were duly shown to the witnesses rather sufficient material is there which suggests that accused were given in police custody after conducting the identification parade test, meaning thereby judicial custody is prior in time as of police custody for physical remand.

14. When examined proceedings of the identification parade, it is noticed that accused were offered if they want, to change their sitting arrangements, they can and at some occasions, they changed their sitting arrangement against the one arranged by the concerned jail authorities. Despite of that they were correctly identified by the witnesses. No plausible objection was raised by the accused at that time when identification parade was being conducted. Every care and caution was exercised by the Magistrate and the concerned jail authorities while conducting the test identification parade. It is duly incorporated in the proceedings of the identification parade that dummies were in resemblance and identical to the accused in respect of their height, features, body and physical structure.

15. Record further shows that all possibilities/codal formalities which humanly could be possible were duly exercised by the Magistrate while conducting the test identification parade including that witness be not acquainted/ familiar with the accused before the test identification parade.

16. Every criminal case is required to be decided in the light of its own peculiar facts. While available material of the case at hand suggests that many questions were put to the witnesses of test identification parade regarding duration of the firing, how and in which manner witnesses were in position to see the accused, which kind of weapons accused were carrying. The question regarding showing of picture of the accused to the witness was explicitly responded in negative. The replies tendered by the witnesses were quite straight, unambiguous and natural, besides consistent and could not be shattered.

17. The medical evidence is fully in consonance with the ocular account. The statement of Dr. Tanvir Afzal Malik (PW-13) who conducted autopsy on the dead bodies of the deceased is also to the effect that deaths of the deceased were due to firearm injuries. In this respect guidance is sought from the recent judgment of Hon'ble Supreme Court of Pakistan reported as "*Sarwar and another v. The State and another*" (2020 SMCR 1250).

18. PW-13 Dr. Tanvir Afsar Malik tendered his professional opinion by stating that deceased Gulzeb sustained ten firearm injuries, Tufail sustained seven firearm injuries while deceased Mushtaq sustained twelve firearm injuries. It is also matter of record that firing was so indiscriminate and in brutal manner that regarding all the three deceased it has been opined by the said PW that deceased died within less than five minutes after sustaining the injuries because duration between injuries and the death has been mentioned as 03 to 05 minutes.

19. PW-13 Dr. Tanvir Afzal Malik also tendered his opinion regarding the four injured persons amongst whom three are real sons of the deceased Gulzeb. It is demonstrated from record that statement of the said PW is corroborated by the Medico Legal Report (MLR) of the said injured witnesses regarding firearm injuries on their bodies and they remained hospitalized for considerable period.

20. On 15.07.2013, Tahir Javed Constable (PW-8) submitted three different samples to the Punjab Forensic Science Agency (PFSA) containing blood stained pieces of seat cover of the

vehicle in which occurrence took place, blood stained cloth lastly wearing by the three deceased at the time of occurrence, cotton with the blood stained earth where occurrence took place, report of the PFSA Ex.PAAV confirmed that human blood was identified on all these samples.

21. On 15.07.2013, said Tahir Javed (PW-8) also submitted 27 cartridge cases which were collected from the crime scene having 22 (C-1 to C-22) of 7.62 x 39 caliber, 02 44 caliber rifles and 03, 30 caliber pistols. On 04.10.2013 said witness submitted 7.62 x 39 caliber rifle and 30 caliber pistol to the PFSA. Report of the PFSA Ex.PAAW certified that said 22 cartridge cases (C-1 to C-22) were wedged with the weapon sent, while of 30 bore pistol were not matched and as far as 02 cartridge cases of 44 caliber, no weapon was sent to the PFSA.

22. Despite careful judicial scrutiny of the record, not a single piece of evidence is witnessed in the terms that what malice injured witnesses of the occurrence had against the accused/ appellants which compelled them to label the accused with the allegation of murder of their real father including two gunmen. Record is silent regarding any evidence of enmity of the witnesses against the appellants. It is beyond the imagination that why real sons (PWs 9, 10 and 11) of deceased father can use dead body of their father as a tool to falsely implicate the appellants. The statements of the accused/ appellants under section 342, Cr.P.C have been examined but view is the same as mentioned supra. Mere blood relation of witnesses is not a ground to disbelieve their version.

23. In "Farman Ali and another v. The State and another" (2020 SCMR 597) the Hon'ble Supreme Court has held that eye-witnesses of the occurrence have no ill-will or motive to falsely implicate the accused persons. Said witnesses remained consistent on each and every material point despite lengthy cross-examination and both the courts below after appraisal of the evidence found them truthful and reliable witnesses. Relation of the witnesses with the deceased was held of no legal embargo for awarding the punishment.

24. Similarly, in another judgment reported as "Raza and another v. The State and 2 others" (PLD 2020 SC 523) held that eye-witnesses had no prior enmity to falsely implicate the accused hence their testimony could not be discarded merely because of their relationship with the deceased especially when their presence at the scene of the crime was not unnatural and unusual. Likewise same principle was reiterated in precedent reported as "Ali Bux and another v. The State" (2018 SCMR 354).

25. In this respect guidance is also sought from the case law reported as "Sarwar and another v. The State" (2020 SCMR 1250) wherein it was held that place of occurrence was never disputed by the defence, presence of the witness at the place of occurrence cannot be doubted and crime was reported to the concerned police on the same day.

26. The statements of the injured witnesses PWs 9, 10 and 11 have been examined with every possible care and it is found that they remained consistent regarding their stance qua the appellants/ accused by approaching them from left side of their vehicle and reckless firing due to which they got severely injured and three individuals were done to death. Despite lengthy cross-examination by independent counsel of each appellant, they could not shatter their stance to that extent. It is further noticed several questions were put to PW-10 regarding that his statement under section 161, Cr.P.C., was not recorded in the hospital rather was recorded in the police station but could not shatter and shake the stance of the said PW.

27. It is further noticed that despite lengthy cross-examination by each appellant on the injured witnesses i.e. PWs 9, 10 and 11, the material portion of their statements regarding murder of three persons at the hands of appellants was not cross-examined and if some questions were put, same remained an unsuccessful attempt. In the light of these facts, there is no option except to believe the version of said injured witnesses. Hon'ble Supreme Court of Pakistan in a recent judgment reported as "Muhammad Shabbir and others v. The State" (2020 SCMR 1206) wherein three persons were done to death in a brutal manner by reckless firing and one person was seriously injured who appeared as PW, autopsy of the dead bodies revealed firearm injuries upon the dead bodies of deceased, held that no discrepancy of such a nature that could shatter salient features of the prosecution case, accused were awarded death penalty

by the trial court which was converted into life imprisonment by the High Court and Hon'ble Apex Court upheld the judgment of Hon'ble Lahore High Court.

28. It is also matter of record that questions were put to the PWs by the counsel of different appellants wherein difference stances, defences were taken like one appellant tried to establish that there was a dispute between PW-12 complainant of the case and the deceased Gulzeb, that there were family disputes amongst their father and their uncles, that from how many generations you are doing the business of jewelry, that weapon you were carrying were whether licensed or otherwise, why your uncle complainant had not hired gunmen for himself, your father was murdered due to fire of his/your gunman, subject incident is a result of your previous enmity etc. It is noticed that different stances have been attempted to be established but all remained just assertions without their further corroboration or material available on record.

29. It is also noticed that accused tried to build a defence by way of putting the questions to the prosecution witnesses that complainant Abdul Sattar SI/SHO and Zulfiqar Inspector involved the present appellants to settle their score with the accused persons having a dispute upon share of amount in another FIR. It was further cross-examined that for completion of said design said two officials have used PWs as a tool in the case. Very surprisingly when cross-examination is looked into upon the said I.O. Abdul Sattar SI wherein he was confronted with the question that you on the behest of the complainant of the case have planted false case upon them. This alleged defence is a self-contradictory. It is also case of the appellants that they are innocent and have been implicated by the police authorities falsely by converting it as a case of dacoity. But admittedly, no one has been convicted/ sentenced in the said offence and all accused in that charge have been acquitted and no appeal has been filed against said acquittal, hence to that extent matter has attained finality.

30. This is also matter of record that neither said stance was ever proved nor any defence evidence was produced rather a contradictory position is on record in a way that on the one hand appellants are asking the PWs that you have been used by Abdul Sattar SI/I.O. and Zulfiqar Inspector while on the other hand said Abdul Sattar has been confronted that you acted on the advice of the complainant i.e. PW-12 Zubair Akhtar. In the light of these factual aspects, contradictory defence pleas and the law on the subject, what rests with the court to believe which version of the accused/appellants is correct?

31. Now advertng to the quantum of sentence of death awarded to the appellants. In this respect first important factor required to be considered is the motive which as per narration of the FIR is in the following words:

This is the only line in FIR which is in respect of the motive. All record has been scanned judicially but failed to find out any material which could suggest that the accused/appellants are the persons to whom said enmity is attributed. Evidence of the prosecution witnesses have been thoroughly evaluated but none of them had alleged any incident regarding enmity with the present accused/appellants.

32. This motive was thereafter changed by way of supplementary statement of the complainant in terms that appellants committed robbery/dacoity. The motive remained only an assertion. There is nothing available by way of tangible evidence which could substantiate this assertion. Needless to mention that when motive changed with another and that too remained an assertion, such vague and non-specific motive in an offence of capital punishment would be considered a mitigating factor. In a judgment reported as "Mst.Nazia Anwar v. The State and others" (2018 SCMR 911), it was held that motive asserted by the prosecution had remained utterly unproved. The law is settled by now that if the prosecution asserts the motive but fails to prove the same then such failure on the part of the prosecution may react against the sentence of death passed against a convict on the charge of murder. Court found although it is proved beyond doubt that appellant was responsible for the murder of deceased yet the story of the prosecution has many inherent obscurities ingrained therein and it was viewed that without any doubt that real cause of occurrence was something different which had been completely suppressed by both the parties to the case and the real cause of occurrence had remained shrouded in mystery. The Hon'bel Apex Court in the given circumstances, converted the death sentence into imprisonment for life.

33. It is also noticed by this Court that there are discrepancies in the statement of the complainant Zubair Akhtar (PW-12). The said witness during the course of identification stated that four persons came out from the vehicle and started firing upon the deceased and injured persons while all other witnesses in their statements mentioned number of the assailants as three. Some other discrepancies are also witnessed. In existence of these discrepancies in the statements and the fact that few cartridge cases were not matched with the recovered weapon, case of the appellants/ accused deserves alteration of punishment in order to meet the ends of justice. The real cause of occurrence had remained shrouded into mystery.

34. In line with above discussion/ findings, it is safely held that due to brutal firing of the accused/appellants three individuals namely (Gulzeb, Mushtaq and Tufail) were done to death, presence of the injured witnesses at the crime scene is natural, postmortem report confirms that death of the deceased were result of firearm injuries, duration between injuries and death was 03 to 05 minutes, occurrence took place at broad daylight, one injured witness (PW-10) was severely injured and remained hospitalized for ten days, his MLR confirms firearm injuries upon his body, present appellants/accused were duly identified by the injured witnesses in the test identification parade conducted under the magisterial supervision, no evidence is available on record which could shatter/weaken the substantial portion of the test identification parade, judicial custody of the accused was first and they were given to the police custody after holding test identification parade, no malice or enmity to falsely implicate the appellants/accused is surfaced. No previous enmity of any nature with the accused/appellants even asserted during the course of evidence. Spot inspection confirmed the incident, medical opinion is in confirmation of ocular account, cartridge-cases C-1 to C-22 collected from the crime scene were duly wedded with the recovered weapon, therefore, case against the present appellants has been established beyond reasonable shadow of doubt. In this respect further guidance is sought from the pronouncement of the Hon'ble Apex Court of the country reported as "Qurban Hussain v. The State" (2017 SCMR 880), "Muhammad Aslam v. The State" (2012 SCMR 593), "Mehr Ali Shah v. The State" (2011 SCMR 116).

35. However, as an abundant caution and for safe administration of criminal justice, when motive is shrouded into mystery, non-specific, vague, not proved one and remained unsubstantiated by any material, discrepancies in the statements of PWs are available, particularly of PW-12, report of the PFSA to some of the cartridge cases regarding recovered pistol is negative, therefore, the sentence of death is required to be altered into the imprisonment for life, hence same is altered into imprisonment for life on each count while rest of the punishments, compensations are maintained, further guidance is sought from the case laws reported as "Khalid Naseer and another v. The State and another" (2020 SCMR 1966), "Muhammad Iqbal v. The State" (PLD 2001 SC 222), "Nawaz Khan and another v. Ghulam Shabbir and another" (1995 SCMR 1007), "Ghulam Hussain alias Guloo v. The State" (2020 MLD 1736).

36. Resultantly, appeals of the appellants (Abdul Hassan, Syed Sajjad Hussain and Haider Abbas) bearing Nos.129, 130, 131, 164 of 2019 and 118 of 2020 are hereby dismissed. However, their sentence of death is altered into the imprisonment for life, on each count while rest of the punishments, compensations are maintained. Murder Reference (M.R. No.08 of 2019) is answered in negative. Benefit of section 382(b), Cr.P.C is also extended to them. All the sentences shall run concurrently.

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