

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

Criminal Appeal No.198/2018

Walayat Hussain & another

versus

The State, etc.

Appellants by: Mr. Jam Khursheed Ahmed, Advocate.

Respondents by: Mr. Hasnain Haider, State Counsel.
Ms. Qurratul Ain Ayesha, Advocate.
M. Ishaq Khan, S.I/I.O.

Criminal Revision No.31/2020

Muhammad Safeer Ahmed

versus

The State, etc.

Petitioner by: Ms. Qurratul Ain Ayesha, Advocate.

Respondents by: Mr. Hasnain Haider, State Counsel.
Mr. Jam Khursheed Ahmed, Advocate.
M. Ishaq Khan, S.I/I.O.

Date of Hearing: 20.07.2020.

MOHSIN AKHTAR KAYANI, J: Through this single judgment, I intend to decide the captioned criminal appeal and criminal revision as the same are arising out of one and same judgment dated 10.10.2018, passed by the learned Additional Sessions Judge-II, (East) Islamabad in case FIR No.23, dated 20.03.2015, U/Ss 302, 324, 34 PPC, P.S. Nilore, Islamabad, whereby appellants Walayat Hussain and Chenzeb have been convicted by the trial Court in terms of Section 302(c) PPC and sentenced to imprisonment for 20 years with fine of Rs.1,00,000/- each. They have also been convicted U/S 324 PPC and sentenced to imprisonment for 05 years with fine of Rs.50,000/- each.

2. Brief facts referred in the instant criminal case arising out of complaint Ex.PA are that on 20.03.2015, complainant Safeer Ahmed/PW-1 was present at his house alongwith his sister Mst. Fareeda Bibi, brother-in-law Jahangir Ahmed, mother and two other brothers Munir Ahmed and Muhammad Jahangir. At about 05:00 p.m. Chenzeb armed with .30 bore pistol, his father Walayat Hussain, armed with 12 bore rifle and Muhammad Ashraf armed with hatchet, appeared on their rooftop and Muhammad Ashraf raised *lalkara* to Jahangir to come out in order to teach him lesson for supporting and helping Mst. Amna Bibi. In the meanwhile, both father and son started indiscriminate firing, upon which complainant and his family members tried to save themselves. Complainant's brother Amjad, who is a labour working in the vicinity came in the house after hearing the firing, Chenzeb with his .30 bore pistol resorted to firing, which landed on the chest of Amjad, who fell down after receiving injuries. When complainant and his family in order to save his brother Amjad rushed, accused Chenzeb fired with .30 bore pistol upon Farhat Jabeen W/o Muhammad Jahangir, which landed on her left side chest, whereas Walayat resorted to firing with his .12 bore rifle which landed on the legs of Mst. Fareeda Bibi/complainant's sister and one fire shot hit on left foot of complainant's mother, who also injured in the said incident. The said incident was seen by complainant as well as his brother Muhammad Jahangir, Munir Ahmed and his brother-in-law Jahangir Ahmed. Injured persons were taken to hospital where complainant's brother Amjad, sister Mst. Fareeda Bibi and sister-in-law Mst. Farhat Jabeen succumbed to injuries, whereas mother remained under treatment. The complaint was converted into FIR No.23, dated 20.03.2015, U/S 302, 324, 34 PPC, P.S. Nilore, Islamabad (Ex.PJ). Investigation was completed by Muhammad Abbas, Inspector/PW-15, Muhammad Akbar, S.I/PW-16 and Muhammad Aslam Kalyar,

Inspector/PW-18 in different intervals of time, arrested the accused persons, recovered weapons of offence and challaned the appellants in terms of Section 173 Cr.P.C. for the purpose of trial. The trial Court after recording of evidence of 18 PWs and 03 DWs concluded the trial and convicted the appellants in the following manner:-

In the light of above discussions and findings; this Court is of the considered opinion that the two accused persons namely (1) Walayat; and (2) Chenzeb in furtherance of their common intention have committed the offence(s) of:

- (1) qatle amd defined under Section 300 PPC and they are awarded punishment under Section 302(c) PPC and are convicted as such, for a sentence of imprisonment of twenty (20) years; and they both have to pay compensation individually to the legal heirs of deceased Amjad, Farhat Jabeen and Farida Bibi in the sum of Rs.100,000/- (Rupees One Lac Only) to each of the legal heirs of the three deceased persons separately, under section 544-A Cr.P.C. and in case failure to pay compensation, they shall have to further undergo imprisonment of Six (6) months;*
- (2) Attempt to qatle amd punishable under Section 324 PPC and are convicted as such, for a sentence of imprisonment of five (5) years with fine of Rs.50,000/- (Rupees Fifty Thousand Only) each; and in case of their failure to pay the fine they shall have to further undergo imprisonment for a term of six (6) months;*
- (3) All the sentences awarded to the two accused persons namely (1) Walayat; and (2) Chenzeb are directed to run concurrently and they are extended benefit of Section 382-B Cr.P.C.*

3. Appellants are aggrieved with the impugned judgment and claimed their acquittal, whereas respondent/complainant's side is also aggrieved with the same judgment and claimed enhancement of sentence through criminal revision as three persons lost their lives in this case.

4. Learned counsel for the appellants contends that trial Court has committed error while convicting the appellants in violation of settled principles of law where prosecution has failed to prove its case nor corroborated the evidence through independent mode and manner; that PW-1 and PW-2 have lodged the FIR after consultation with family members and as such considerable delay was caused in the registration of FIR which creates

doubt and suspicion; that there are material contradictions and discrepancies and dishonest improvement of eyewitnesses i.e. PW-1 & PW-5; that recoveries are ineffective viz. a viz. the role attributed by the prosecution witnesses which has not been proved through independent evidence; that there is glaring contradiction in the medical and ocular evidence and pellets recovered from dead body of Amjad were of .12 bore gun and this aspect has been referred in para-12 of the impugned judgment but all these aspects have been ignored by the trial Court and convicted the appellants only on one count that three persons have lost their lives, although the motive has not been proved, even the mode and manner was not explained by PWs, even parties have not come up with complete truth.

5. Conversely, learned counsel for the complainant, who is also petitioner in Crl. Revision No.31/2020 argued that case has been proved against the appellants who have been assigned with specific role and committed murder of three innocent persons without any justification whereas trial Court has committed error and judgment impugned is full of self contradictions which lacks the requirement of a complete judgment under the law, even principle appreciated by the trial Court for award of sentence in terms of Section 302(c) PPC is not made out from the bare reading of evidence recorded by the prosecution as it is case of capital sentence, whereas settled principle of law has not been considered in this matter; that appellants should be convicted U/S 302(b) PPC and they are liable to be awarded with death sentence on three counts.

6. Arguments heard, record perused.

7. Perusal of record reveals that prosecution in order to prove its case has produced Dr. Tanveer Afsar Malik/PW-13 and Dr. Henna Azmat, Medical Officer/PW-17, who conducted the autopsy/postmortem of Amjad Hussain

deceased, Farhat Jabeen deceased, Farida Bibi deceased respectively. PW-13, who has conducted the autopsy of Amjad Hussain has observed three firearm injuries in the following manner:-

- i. *Fire arm entry wound on the front of the right chest on the 3rd intercostals space 5 cm from midline with slight blackening and charring marks measuring 1x1 cm. X-Ray was done and pallet was recovered (metallic foreign body) overlying 10th rib posterior on right side handed over to police. No Exit wound.*
- ii. *Fire arm entry wound on the left arm lateral aspect with slight blackening and charring marks measuring 1x1 cm. X-Ray was done and pallet was recovered from wound and handed over to police. No exit wound.*
- iii. *Fire arm entry wound 5 cm below the axilla left side with slight blackening and charring marks measuring 1x1 cm with inverted edges. Pallet was recovered from the wound and no exit wound.*

Whereas PW-17 has conducted the autopsy of Farhat Jabeen and noted the following injuries:-

1. *Fire arm entry wound on the right side of chest below axilla lateral aspect measuring 1.5 cm x 1.5 cm with slight blackening and charring marks and inverted edges. No exit wound.*
2. *Bruise mark on left lumbar aspect measuring 4 x 3 cm. X-Ray was conducted and pallet was found and recovered from left lumber aspect area, in the 12th rib and handed over to police in the sealed bottle. Incision was given in this area.*

Similarly, injuries noted by PW-17 on the dead body of Farida Bibi are as under:-

1. *Fire arm entry wound about 0.5 x 0.5 cm, on posterior aspect of mid thigh on right leg with no blackening but slight charring marks.*
2. *Fire arm exit wound 0.5 x 0.5 cm above the right knee on lateral side anteriorly.*
3. *Fire arm entry wound 0.5 x 0.5 cm on posterior aspect of mid thigh on left leg with no blackening but slight charring. Pallet recovered from the wound upper aspect of the thigh and handed over to police. No exit wound.*
4. *Fire arm entry wound on lateral aspect of right calf measuring 1 x 1 cm with no blackening but slight charring.*
5. *Fire arm exit wound on the medial aspect of right calf measuring 1 x 1 cm.*

6. *Fire arm entry wound 0.5 x 0.5 cm on medial aspect of right ankle with no blackening but slight charring.*
7. *Fire arm exit wound on the lateral melleolus of the right foot measuring 0.5 x 0.5 cm.*
8. *Bruise with entry wound over the medial aspect of right leg above the ankle of right foot measuring 0.5 x 0.5 cm. Pallet shown in the X-Ray done.*

8. The above referred evidence clearly spells out that all three deceased have received firearm injuries, even pallets were recovered from dead bodies and handed over to the I.O alongwith blood stained clothes with corresponding hole as noted in the examination by the Doctors.

9. The prosecution has also produced the National Forensic Science Agency report Ex.PZI, which confirms the use of four kinds of weapons including shot gun, .30 bore pistol and smooth bore ammunition.

10. The prosecution has produced the eyewitnesses Muhammad Safeer as PW-1, Muhammad Jehangir as PW-2, Munir Ahmed as PW-3, Jehangir Ahmed as PW-4 and Mst. Raqeeba Bibi (injured) as PW-5, who corroborated each other and remained consistent on the point of attribution of specific role to each accused.

11. Initial investigation was conducted by PW-15 Muhammad Abbas, Inspector, who reached at hospital after receiving the information of occurrence, prepared injury statement Ex.PS, PQ & PU of three deceased persons and managed their autopsy, however, investigation was transferred to Muhammad Akbar, S.I on 21.03.2015 on the very next day of the alleged incident who has fulfilled other requirements of investigation while preparing the recovery memos of blood stained clothes and other articles given by the Doctor. Matter was also investigated by Muhammad Aslam Kalyar, Inspector/PW-18, who received the complaint from Safeer Ahmed on which FIR was registered, prepared un-scaled site plan Ex.PZC and also recovered the fire empties of .30 bore pistol, 09 empties of .12 bore through Ex.PZD from

the place of occurrence, arrested the accused person Muhammad Ashraf, transmitted the recovered empties to FSL, also arrested Walayat and Chenzeb, interrogated them and got recovered weapons of offence from the accused persons and submitted final report. Statement U/S 342 Cr.P.C. of the appellants was recorded by the trial Court, whereby accused Walayat Hussain admitted his presence in the incident while answering question No.3 and claims that complainant side is the aggressor who attacked at his house.

Relevant extract of Q.No.3 is as under:-

It is incorrect. Actually Jehangir, his brother Safeer, Muneer, Amjad (deceased) son of Jehangir Mohsin, both sons of Muneer namely Husnain and Saqlain, the uncle of Jahangir namely Khalil Ahmed, his son Rustam and ladies Fareeda Bibi, Amna Bibi and Farhat Jabeen etc suddenly attacked my house whereupon my wife Zamurd Bibi, daughter Saiqa Parveen and daughter in law Forin Bibi locked me in a room and put lock outside the room. The raiders were armed with deadly weapons. I was alone with three ladies (my wife Zamurd, daughter Saiqa Parveen, daughter in law Foreen Bibi). I was unarmed at home, no other male member was present at home. The co-accused Ashraf and Chanzaib were not present at home.

Whereas accused Muhammad Ashraf denied the incident and accused Chanzeb has also denied the incident. All three accused appeared as defense witnesses and recorded their stance in terms of Section 340(2) Cr.P.C.

12. Learned trial Court while considering the entire evidence convicted the appellants and sentenced them for 20 years in terms of Section 302(c) PPC by highlighting certain discrepancies, which are as under:-

- *“Admittedly, prosecution has not produced Mst. Amina Bibi as a witness of this case nor the defence side when opted to produce defence evidence. None of the parties brought the actual details of the motive aspect of the case. But irrespective of the fact that any lalkara was given by accused Ashraf or not as the complaint and FIR are lodged by complainant party after deliberations and consultation with each other, yet from above evidence one thing cannot be discarded from consideration that there was some dispute between the family of Jahangir from complainant side and of Walayat from accused side but both the parties did not come up with truth of the matter.”*

- PW-18, IO/Inspector Muhammad Aslam Kalyar in his cross examination admitted the fact that, ".....I did not associate any witness from the vicinity including neighbourers except blood relations." No explanation is offered as to why despite presence of score of people who could have been made PWs, the IO/Inspector did not make them witness of incident and to show independency of the actions of the police performed in the investigation.
- In the last two spells which were of the effective firing accused Ashraf was not in the picture anywhere and the second incident of firing was after a pause of atleast 10 minutes. Like witness PW-3 Munir deposed before the court in cross examination, ".....Second spell of firing is carried by Chenzeb from his rooftop at my brother deceased Amjad and same is started after 10 minutes of the first spell". It is an admitted fact that there is no use of hatchet for causing injury to anyone. I also found that even issuance of Lalkara which the other eye witnesses saying was before the first incident of ineffective firing, PW-4 Jahangir deposed in his in chief that such Lalkara was after the second spell of firing, in which deceased Amjad was hit from fire of Chanzeb. PW-4 Jahangir Ahmed materially contradicted the other eye witnesses here. Similarly PW-3 Munir's deposition that even the second spell of firing was from the rooftop is also materially contradicting the deposition of other witnesses.
- Besides I also found a contradiction in the deposition of eye witnesses where order of causing fire short to the victims was differing. Like all saying that first Amjad was hit then at second Farhat Jabeen, then at third Farida Bibi and then at fourth Raqeeba Bi. Whereas PW-3 Munir in the order of effective firing brought Farida Bibi at second and Farhat Jabeen at third in the order.
- When test of the case of Niaz Supra is applied here it seems that it is a case where the witnesses are interested witnesses and were not coming up with whole of the truth. Thus, their testimonies require corroboration but what I noticed is that neither the medical nor forensic nor the other evidences of prosecution are supporting its case. Like all eye witnesses deposed that accused Chenzeb had 30 bore pistol, and attributed his fire shots on deceased Amjad, whereas as per medical and forensic evidence deceased Amjad suffered 12 bore gunshot injuries (see relevant evidence in the discussion of points No.I to III). Similarly scale site plan at the place of deceased Amjad does not corroborate where two empties of 30 bore were found which otherwise is one less in count of the injuries suffered by deceased Amjad. This is besides that the injuries suffered were never found to be of from a 30 bore weapon rather of 12 bore gun.
- From above, it can be said that the ocular account of prosecution is not straight forward and is not fitting in the natural circumstances of the case; therefore, to seek support from corroborative pieces of evidence was a sine qua non but unfortunately what appears is that all the corroboratory pieces of evidence stand in negation to what prosecution's ocular accounts suggest by deposing.

13. While considering the above factors highlighted by the trial Court in the impugned judgment the trial Court has concluded the sentencing portion while relying upon 2017 SCMR 1639 (Muhammad Zafar Vs. Rustam Ali) and awarded them sentence in terms of Section 302(c) PPC with the concluded reasons in the following manner:-

97. *But when I come across to determine the question of quantum of punishment for this offence to accused Walayat and Chenzeb, I found case law of Muhammad Zafar v. Rustam Ali, 2017 SCMR 1639 (FB), where in the similar circumstances when a learned Division Bench of the Honourable Lahore High Court, Bahawalpur Bench, observed that none of the parties came with whole truth and both the parties had tried to twist and mould the story of occurrence in its favour, thus, the real igniting cause and as to what immediately preceded the occurrence, remained suppressed by respective parties, their lordships of the full bench of the Honourable Supreme Court while appraising above circumstances in para-8 found themselves of the considered opinion in para-9 that the case against the said accused is covered under Section 302(c) PPC and not under Section 302(b) PPC. So in awarding the punishment I would be following the case law.*

98. *Raqeeba Bi injured person, the document of MLR was not formally produced before the court, thus, cannot be seen. But it is borne out from the case that the injuries to her person were during the incident and from the fire shot of accused Walayat.*

99. *It is, thus, since the two accused persons Walayat and Chenzeb suppressed material facts and their conduct of abscondance suggests that they had common intention and they acted in furtherance of their common intention therefore are also held for criminal liability of the attempt to qatle amd under Section 324 PPC to Mst. Raqeeba Bi. However, since the MLR is not produced, the accused Walayat cannot be awarded punishment for the hurt he caused to Mst. Raqeeba Bi in addition to punishment of Section 324 PPC.*

14. I have gone through the evidence as well as above referred reasons which prevailed the trial Court for award of sentence of 20 years under Section 302(c) PPC but not convinced with the reasons which are made basis for award of said sentence, rather the entire judgment seems to be self contradictory whereby the trail Court has not appreciated the evidence on the touchstone of *Qanun-e-Shahadat* Order, 1984 especially when accused persons/appellants have come up with their specific pleas in terms of Section

340(2) Cr.P.C., wherein principal accused/appellant Walayat Hussain acknowledged his presence in the incident and appeared as DW-2 in the trial. In such situation it is the duty of trial Court to apply the principle of sifting the grain from chaff would fix the responsibility of an accused following the rule of independent corroboration, hence it is the duty of the Court to find out truth and the extent of responsibility of an accused. The evidence of the witness cannot be brushed aside and ruled out of consideration against all accused for mere reason that one or more accused in the case were found not guilty as held in case reported as PLD 2002 SC 643 (Shera Masih vs. The State).

15. Similarly, trial Court has not set up the case in the impugned judgment while considering and appreciating the law regarding the award of punishment in cases where situation was not clear, although it is the duty of prosecution but the reasons referred by the trial Court for declaring the incident that parties did not come up with complete picture and truth is not justiciable from record, even the evidence, ocular account and FSL report were not evaluated *vis-a-vis* the medical evidence, which clarifies the entire picture.

16. I have gone through the judgment of trial Court word by word with the able assistance of the parties, which persuaded me to hold that major portion of the impugned judgment negates the earlier part of the impugned judgment, even the highlighting of different points for determination as referred in Para-16, the mode and manner in which judgment was written, is considered to be an approach adopted by the Civil Courts while deciding different issues in the competent civil jurisdiction, such aspect, though not unlawful, but bifurcating the evidence in bits and pieces further complicate the scenario referred in the impugned judgment, rather it looks a confusing judgment where motive has been disbelieved, especially when there was no motive

brought on record by the prosecution, even the trial Court has declared the prosecution as well as accused party that they have not come up with complete truth, it might be the case, but it is duty of the Court to consider the admissible evidence in line with the principle of *Qanun-e-Shahadat* Order, 1984 for decision of a case in a reasonable manner. The mistakes conducted by the I.O could not be given a beneficial interpretation in favour of accused.

17. The judgment relied upon by trial Court is also considered by this Court with the view that sentence awarded to the appellants in terms of Section 302(c) PPC is justiciable or otherwise. In order to answer this proposition I have gone through the judgments reported as PLD 1980 Peshawar 1 (Gul Hassan Khan Vs. Government of Pakistan and another), 2000 SCMR 406 (Abdul Zahir and another Vs. The State), PLD 2003 SC 512 (Muhammad Saleem Vs. The State), 1981 SCMR 174 (Talib Hussain Vs. The State), 2001 YLR 3198 (Haji Shaukat Ali Vs. The State), 2005 MLD 389 (Saeed Shah and others Vs. The State and others), whereby this Court is convinced that principle for award of sentence while differentiating the case from Section 302(b) PPC to Section 302(c) PPC are different which were not appreciated by the trial Court in a proper manner. The case of sudden provocation where it could not be ascertained as to what factors motivated the commission of offence or where grave and sudden provocation was seen in the moment of passion without any premeditation, planning, sentence would be given in terms of Section 302(c) PPC or where murder was committed by the legal heirs of deceased. The golden principle settled in sentencing regime in terms of Section 302(c) and 302(b) PPC is *qisas* and *tazir*. Similarly, Section 302(c) PPC is attracted to those murder cases which were committed in those circumstances which do not attract the *qisas*. The injunction of Islam has provided the *qisas* as sentence, which is not applicable in certain circumstances, therefore for ready

reference and guidance judgment reported as 2012 YLR 1366 (Tariq Mehmood Vs. State), 2003 P.Cr.L.J 1619 (Khan Muhammad Vs. The State), 1998 P.Cr.L.J. 111 (Walayat Vs. The State), 2003 YLR 727 (Nasir Khan Vs. The State), PLD 2007 SC 111 (Iftikhar-ul-Hassan Vs. Israr Bashir), PLD 1996 SC 274 (Ali Muhammad Vs. Ali Muhammad) and PLD 2015 SC 77 (Zahid Rehman Vs. State) were to be considered relevant for such kind of proposition, although the Apex Court in recent orders remanded the criminal case where certain principles of law have not been considered in a proper manner by the trial Court, therefore, guidance has been sought from 2020 SCMR 414 (Nadar Wali Vs. Sumaya Gul), 2020 SCMR 293 (Naseer Khan Vs. Said Qadeem), 2019 SCMR 542 (Talal Ahmed Chaudhry Vs. State), 2018 SCMR 511 (Shakeel Ahmad Siddiqui Vs. Muhammad Nauman Siddiqui), 2018 SCMR 141 (Muhammad Ajmal Vs. State), PLD 2018 SC 837 (State Vs. Haji Nabi Bux) and 2017 SCMR 1946 (Tahir Javed @ Tara Vs. State), hence, by applying these principles of remand it is appropriate that this Court will not decide the appeal for the purpose of sentence or acquittal nor answer the proposition for enhancement of sentence claimed by the petitioner through connected criminal revision as it is the role of trial Court to apply its mind judicially for settlement of proposition in the light of statutory law as well as guiding principles of superior Courts in such eventuality.

18. While considering the above parameters, guidance and the evidence of this case, the learned Trial Court has wrongly awarded the sentence in terms of Section 302(c) PPC without application of legal principles settled by the superior Courts referred above despite the fact that ocular account *vis-a-vis* the medical evidence speaks otherwise, therefore, impugned judgment of trial Court is not in accordance with law. Hence the captioned Criminal Revision No.31/2020 (Muhammad Safeer Ahmed vs. The State, etc.), is hereby ALLOWED

in the manner that the sentence awarded to the appellant is contrary to legal principles, therefore, same is hereby SET ASIDE and the matter is REMANDED to the trial Court to give rehearing to the parties concerned and rewrite the judgment in accordance with law without being prejudiced by any of the observations made by this Court or from the previous findings recorded in the impugned judgment. Learned Sessions Judge (East), Islamabad shall consider it appropriate to decide the matter herself or by entrusting the same to any other Court having competent jurisdiction. However, it is expected that court seized with the matter shall conclude the same within the period of two (02) months by all means after summer vacations.

19. The captioned Criminal Appeal No.198/2018 (Walayat Hussain & another vs. The State, etc.) is hereby DISPOSED OF in above terms.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on 24th Aug 2020.

JUDGE

Zahid