IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Bench
Justice Muhammad Hashim Khan Kakar
Justice Salahuddin Panhwar
Justice Ishtiaq Ibrahim

CRIMINAL PETITION NO.1431 & 1487 OF 2020

(On appeal against the judgment dated 11.11.2020 passed by the Lahore High Court, Rawalpindi Bench, in Crl. Appeal No.53/2016 and MR. No.15/2016)

Riffat Hussain *(Crl.P.L.A.1431/2020)*

Mst. Zahida Bibi *(Crl.P.L.A.1487/2020)* ... Petitioner(s)

Versus

Zahida Bibi and another *(Crl.P.L.A.1431/2020)*
The State thr. P.G, Punjab and another *(Crl.P.L.A.1487/2020)* ...Respondent(s)

For the Petitioner(s) (Crl.P.1431/2020):	: Malik Waheed Anjum, ASC Syed Rifaqat Hussain Shah, AOR
(Crl.P.1487/2020):	: Mr. Sajjad Ahmed Bhatti, ASC
For the State:	: Mr. Tariq Siddique, APG, Pb.
Assistance:	: Muhammad Subhan Malik (Judicial Law Clerk)
Date of Hearing:	: 25.11.2025

JUDGMENT

Salahuddin Panhwar, J.–

Crl.P.L.A.1431/2020: Through this petition for leave to appeal, the petitioner Riffat Hussain has called in question the judgment rendered by the Lahore High Court, Rawalpindi Bench, in Criminal Appeal No.53 of 2016 and Murder Reference No.15 of 2016. The learned High Court answered the Murder Reference in the negative and altered the sentence of death awarded to the petitioner to imprisonment for life on two counts; hence, instant petition for leave to appeal.

2. The prosecution case, as set out in the First Information Report lodged by Abdul Rehman (since died), is that on 1 August 2003 at about 3:00 pm, the complainant, his son Muhammad Ashfaq, the latter companion Zia ul Haq, and witnesses Behram Khan and Muhammad Ishaq were sitting at the hotel of one Aslam taking tea. At that moment, accused Riffat Hussain, allegedly armed with a *Kalashnikov*, and

Ghulam Abbas, armed with a 7 mm rifle (killed in an encounter), arrived at the spot. They raised a *lalkara* that whoever wanted to survive should not move, and thereafter both accused opened fire upon Muhammad Ashfaq and Zia ul Haq, hitting them on various parts of their bodies, as a result of which both fell down and succumbed to their injuries at the spot.

3. The stated motive for the occurrence was that the daughter of Muhammad Sadiq had earlier been engaged to Muhammad Ashfaq deceased; that engagement was broken off and the girl was subsequently engaged to accused Riffat Hussain. Muhammad Ashfaq was allegedly adamant that he would not allow the marriage of his former fiancée with Riffat Hussain. It was alleged that due to this grudge, the accused, at the instigation of Muhammad Sadiq, Mst. Gul Nisa and Mst. Eid un Nisa, committed the occurrence.

4. Initially, only the persons charged with abetment were arrested, sent up for trial and, after a full-fledged trial, acquitted of the charge. During that trial, Riffat Hussain and Ghulam Abbas were proclaimed offenders and did not face the proceedings. Subsequently, it was reported that Ghulam Abbas had been killed in an encounter, whilst the present petitioner was apprehended on 3 May 2012. Upon completion of investigation against him, a report under section 173 of the Code of Criminal Procedure 1898 (**Cr.P.C.**) was submitted before the trial court.

5. The petitioner, when indicted, pleaded not guilty and claimed trial. In order to prove the charge, the prosecution examined eleven witnesses before the learned trial court. The ocular account was provided by Muhammad Behram Khan (PW5) and Muhammad Ishaq (PW6). However, Behram Khan could not be produced for cross-examination in the subsequent proceedings and was ultimately given up by the prosecution. Muhammad Akbar, retired Head Constable (PW2), spoke to the execution of non bailable warrants of arrest and the proclamation proceedings against the appellant. Muhammad Riaz (PW8) testified regarding the recovery of the weapon of offence from the appellant. Muhammad Aslam SI (PW9) and Muhammad Ameer Inspector (PW10) deposed about investigation steps.

6. Learned counsel for the petitioner has contended, in substance, that the prosecution evidence is marred by material inconsistencies and contradictions; that it does not sit comfortably with the medical evidence; that the recovery of the weapon is a mere fabrication introduced to give artificial support to a weak prosecution case, and in

any event is inconsequential; that the petitioner is innocent and has been roped in with mala fide intention and ulterior motive; that the alleged eye witnesses were not in fact present at the time of occurrence and, even if they were, their testimony stands alone and is not corroborated by any independent evidence; that the alleged motive has not been proved. Learned counsel has finally submitted that the prosecution has failed to prove its case beyond reasonable doubt, hence the petitioner is entitled to acquittal.

7. Conversely, learned Additional Prosecutor General has opposed the petition and supported the impugned judgment. He has argued that the matter was reported to the police promptly, without any element of deliberation or consultation; that the petitioner is specifically nominated in the FIR with a clear attribution of role; that the ocular account of the prosecution rests mainly upon two statements, namely that of the complainant Abdul Rehman (examined as PW8 in the earlier trial) and that of Muhammad Ishaq (PW6) in the subsequent trial; that the testimony of Abdul Rehman recorded in the earlier trial is admissible and can be read in evidence in the later trial under Article 47 of the *Qanun-e-Shahadat* Order 1984 (**Order 1984**); that the prosecution version is supported by medical evidence, by the recovery of the weapon of offence and by the deliberate abscondence of the petitioner which, according to learned law officer, further tightens the rope around his neck.

8. We have heard learned counsel for the parties and have carefully examined the record. The pivotal legal issue which arises for determination is whether, in the later trial of the petitioner, the court was entitled to place reliance upon the deposition of Abdul Rehman (PW8 of the earlier trial), who had in the meantime died, that deposition having been recorded in an earlier judicial proceeding arising out of the same incident at a time when the present petitioner was absconding and was not before the court.

9. The record reveals that in the first trial, which concerned the co-accused charged with abetment, Abdul Rehman (PW8 in that earlier trial) deposed in detail about the facts of the incident. He was duly cross-examined by the defence in that proceeding, and his deposition together with the cross-examination was read over to him on 10 November 2003. His statement was consistent with the prosecution case and he accurately described the role of each of the accused. At that point in time, accused Riffat Hussain was absconding and did not face trial. About nine years later, when he was arrested and made to

face trial, Abdul Rehman had passed away and was therefore unavailable to repeat his deposition so as to afford the petitioner a direct opportunity of cross-examination.

10. It is necessary, before addressing the facts, to set out the governing legal framework. As a general rule of evidence, only such statements are admissible as evidence which are made on oath or affirmation during judicial proceedings, before a court or a person authorised by law to record evidence, and in the presence of the adverse party, who is afforded a fair opportunity to cross-examine the witness. Section 353 of Cr.P.C. embodies this general rule, which reads as under:

> **353. Evidence to be taken in presence of accused.**
> *Evidence to be taken in presence of accused. Except as otherwise expressly provided, all evidence taken under 1 [Chapters XX, XXI, XXII and XXIIA] shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader.*

Under the provisions of section 353 Cr.P.C, therefore, it is mandatory that evidence should be recorded in the presence of the accused or, where his personal attendance is dispensed with, in the presence of his pleader. The underlying rationale is to ensure a full and fair opportunity of defence, and to eliminate subsequent pleas of prejudice founded upon absence from the proceedings.[1]

11. However, the law itself carves out limited exceptions to this general requirement. So far as the present case is concerned, three such exceptions are material.

> First, Article 46 of the Order 1984 provides for statements as to the cause of a person's death, commonly known as dying declarations.
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> Secondly, Article 47 of the Order 1984 contemplates the use, in a subsequent judicial proceeding, of evidence given by a witness in a previous judicial proceeding between the same parties, when that witness is dead, cannot be found, has become incapable of giving evidence or cannot be procured without an amount of delay or expense which would be unreasonable, provided that in the earlier proceeding the party against whom such evidence is now

[1] *Miran vs. The State (2013 P Cr. L J 244)*

proposed to be used had the right and opportunity to cross examine that witness.[2]

Thirdly, section 512 Cr.P.C. provides a special mechanism to record and preserve evidence where an accused person has absconded and there is no immediate prospect of arresting him. That provision reads as under:

> **512. Record of evidence in absence of accused.** *(1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him the Court competent to try or send for trial, to the Court of Session or High Court such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, of trial for the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.*

A plain reading of section 512 of Cr.P.C shows that when an accused has absconded and there is no immediate prospect of arresting him, the court competent to try the case may, in his absence, examine the prosecution witnesses and record their depositions. Upon the arrest of such person, any such deposition may be given in evidence against him at the trial for the offence with which he is charged, provided that the deponent is dead, incapable of giving evidence, or cannot be procured without unreasonable delay, expense or inconvenience.[3]

12. There can be no cavil of proposition regarding the basic principle of criminal jurisprudence that, ordinarily, conviction cannot be founded upon evidence recorded in the absence of the accused or his pleader, and that non compliance with the requirement of presence may vitiate the conviction, as recognised, *inter alia*, in the Zaman Case.[4] The position, however, is materially different where the accused has himself chosen to abscond and thus to stay away from the process of law. A person who deliberately evades the jurisdiction of the court cannot be permitted to derive any advantage from his own wrongful conduct. The Latin maxim "***Nullus commodum capere potest de injuria sua propria***" embodies this principle, namely that no person

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[2] *Arbab Tasleem vs. The State (P L D 2010 Supreme Court 642)*

[3] *Ahmad Ali vs. Ebrar Khan, etc (Cr.R No. 07-P/2021)*

[4] *The State v. Ali Zaman reported in 1981 PCr.LJ 194*

is allowed to take advantage of his own wrong. As far as the question that the accused Riffat Hussain was not given an opportunity to cross-examine the complainant Abdur Rahman is concerned, it is observed that the accused Riffat Hussain was an absconder and he impliedly waived his right to cross-examine the complainant at that previous trial.

13. When Article 47 of the Order 1984 is read in conjunction with section 512 Cr.P.C, the following position emerges. Evidence previously recorded in a judicial proceeding relating to the same occurrence may be used in a later proceeding if the witness is dead, cannot be found, has become incapable of giving evidence, or cannot be procured without unreasonable delay or expense, provided that the party against whom such evidence is now relied upon had, in the earlier proceeding, the right and opportunity to cross examine. Further, where the accused had absconded and thereby lost certain rights and protections which flow from his presence at trial, he cannot subsequently insist, as a matter of right, upon strict compliance with procedural formalities such as the formal transposition through which the earlier statement is made available to the court under section 512 Cr.P.C.

14. Article 131 of the Order 1984 vests in the trial judge the authority to decide questions regarding the admissibility of evidence. Where the substance of the statutory conditions is satisfied, the court is competent to read the earlier testimony as evidence and to give it due weight, whilst ignoring minor or technical irregularities concerning formal transposition under section 512 Cr.P.C.

15. Applying these principles to the case at hand, it is not disputed that Abdul Rehman, the complainant, had deposed in the earlier trial; that his statement was recorded by a competent court; that he was cross-examined by the defence in that proceeding; that his testimony related to the same incident; and that, by the time the present petitioner was arrested and put to trial, Abdul Rehman had died and was therefore unavailable as a witness. The parties in both proceedings were substantially the same, and the defence in the earlier trial had full opportunity to cross examine him. In these circumstances, his deposition satisfied the conditions of Article 47 of the Order 1984, and the learned trial court and the learned High Court were justified in reading that statement together with the testimony of Muhammad Ishaq (PW6) recorded in the subsequent trial.

16. We now turn to the overall evaluation of the prosecution evidence. The occurrence was reported to the police within a very short

span of about one and a half hours by Abdul Rehman, the real father of deceased Muhammad Ashfaq. The promptness of the FIR effectively rules out the possibility of deliberation and consultation in nomination of the accused. Petitioner Riffat Hussain is specifically named in the FIR alongwith his co-accused Ghulam Abbas, with the clear allegation that both, armed with their respective weapons, fired upon Muhammad Ashfaq and Zia ul Haq and caused their instantaneous deaths.

17. The oral account, consisting of the earlier statement of the complainant Abdul Rehman and the later testimony of Muhammad Ishaq (PW6), is sufficient to establish the presence and active participation of the petitioner in the crime. A close and comparative reading of both statements reveals that they consistently adhere to the version set out in the FIR, and that they support the prosecution case by giving minute details of the occurrence. The presence of these witnesses at the scene is natural in the circumstances and, significantly, was not seriously challenged by the defence during cross-examination.

18. We have carefully scrutinised their depositions and find them to be straightforward, natural and confidence inspiring. We have discovered no material contradiction or inherent improbability which would justify discarding their testimony.

19. The ocular account stands supported by the medical evidence regarding the nature, number and location of the injuries on the deceased and the cause of death. The prosecution case also gains some corroboration from the recovery of the weapon of offence at the instance of the petitioner and from his deliberate and prolonged abscondence for nearly nine years, which is a relevant circumstance when considered alongside other evidence.

20. In view of the above discussion, we find ourselves in agreement with the concurrent findings of the courts below that the prosecution has successfully proved its case against the petitioner beyond reasonable doubt. The contentions raised on behalf of the petitioner do not persuade us to take a different view or to interfere with the impugned judgment to the extent of conviction.

21. The above paragraphs furnish the reasons for our short order dated 25 November 2025, which reads as under:

"For reasons to be recorded later on, these petitions are dismissed. However, the sentence of imprisonment for life awarded to the petitioner Riffat Hussain on two counts is ordered to run concurrently."

Crl.P.L.A.1487/2020: This petition seeks enhancement of the sentence awarded to respondent No 2, namely Riffat Hussain. We have heard learned counsel and examined the record with care. In the circumstances of the case, including the nature of the occurrence, the role attributed to the respondent and the reasons recorded by the learned High Court for converting the death sentence into imprisonment for life, we do not find any legal or factual ground to enhance the sentence. The discretion exercised by the learned High Court in this regard does not appear to be arbitrary or perverse so as to warrant interference by this Court. Therefore, leave is refused and the petition is dismissed.

Judge

Judge

Judge

Islamabad
25.11.2025
Muhammad Subhan Malik/-

Approved for reporting.