

Judgment Sheet
IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT

Crl. Appeal No.1010-J/2015
(Shahbaz vs. The State)

Murder Reference No.190/2015
(The State vs. Shahbaz)

JUDGMENT

Date of hearing: 16.01.2019

Appellant by: Mr. Azam Nazeer Tarar, Advocate.

State by: Mr. Muhammad Arshad Farooqi,
Deputy Prosecutor General.

Complainant by: Hafiz Allah Yar Sipra, Advocate

SAYYED MAZAHAR ALI AKBAR NAQVI, J:-

Shahbaz son of Hayyat, caste Sahmal Pawali, resident of Ward No.2 Mohallah Tufailpura Bhowana, District Chiniot, appellant, along with Jahangir son of Hayyat and Muhammad Hayat son of Khan (both since acquitted) and Nawaz son of Hayyat (since tried and acquitted in a separate trial being juvenile) were involved in case FIR No.377/2011, dated 14.07.2011, offence under Sections 302, 324, 337F(i), 34, PPC, registered with Police Station Bhowana, District Chiniot. They were tried by learned Additional Sessions Judge, Chiniot, under the afore-mentioned offences. The learned trial court after completion of the trial, convicted and sentenced the appellant vide judgment dated 27.04.2015 in the following terms:-

- Under Section 302(b), PPC, sentenced to death as Ta'zir with direction to pay Rs.5,00,000/- as compensation to legal heirs of deceased Mst. Ghulam Bibi in terms of Section 544-A, Cr.P.C. and in case of default in payment thereof, to undergo S.I. for six months.
- Under section 324, PPC, for attempting to commit Qatl-e-Amd of Faheem, injured PW sentenced to undergo R.I. for seven years with fine of Rs.1,00,000/- and in case of default in payment thereof, to further undergo S.I. for three months.
- Under section 337F(i), PPC, for causing injury to injured PW Faheem, sentenced to undergo R.I. for six months with direction to pay Daman Rs.50,000/- to the victim/injured PW.

2. Being aggrieved by the judgment of the learned trial court, Shahbaz, appellant has assailed his conviction and sentence through filing Crl. Appeal No.1010-J/2015 while learned trial court forwarded Murder Reference No.190/2015 for confirmation or otherwise sentence of death inflicted upon convict in terms of Section 374, Cr.P.C. As both the matters are arising out of one and the same judgment of the learned trial court, therefore, these are being disposed off through consolidated judgment.

3. Prosecution story as portrayed in the FIR (Exh.PA/1) lodged on the statement (Exh.PA) of Noor Muhammad son of Ali Muhammad, caste Kumhar, (PW-2) is that the complainant is resident of Ward No.3 Bhowana and earns his livelihood by labour. On 14.07.2011 at 4.30 PM, the complainant along with his daughter Ghulam Bibi, Faheem son of Noor Muhammad and Abdullah son of Ghulam Muhammad after having purchased the household articles, were returning to their house on foot. When they reached in front of shop of Mansha Bhutta, suddenly, accused (1) Shahbaz armed with .30 bore pistol, (2) Nawaz armed with .30 bore pistol, (3) Jahangir having bag of bullets (4) Muhammad Hayyat s/o Muhammad Khan empty handed reached there. Muhammad Hayyat and Jahangir

accused raised 'lalkara' that they will not spare them alive. Shehbaz accused made successive fire shots upon Mst. Ghulam Bibi hitting her on her left arm, left flank, in front of chest, belly and left buttock who fell down. Nawaz accused made pistol fire shot hitting grand-son/nawasa of the complainant namely Faheem on his left hip whereas Jahangir and Muhammad Hayyat accused persons raised 'lalkara' that if any one stepped forward, would face the dire consequences. Upon hue and cry raised by the complainant and his companions, people from the nearby vicinity came out of their houses and upon seeing them accused persons fled away from the spot by brandishing their weapons towards grid station. The complainant and PWs evacuated the injured PWs to the Civil Hospital Bhowana where Mst. Ghulam Bibi succumbed to the injuries.

Motive behind the occurrence as disclosed in the crime report was that grand-son of the complainant namely Mobashar contracted love marriage with Mst. Tahira Bibi daughter of Hayyat accused. Due to this grudge, accused persons committed murder of Mst. Ghulam Bibi and also caused injuries to Faheem.

4. *After the occurrence, Noor Muhammad, complainant/PW-2) appeared before Muhammad Afzal, Inspector (PW-10) was posted as Inspector/Incharge Investigation, Police Station Bhowana, Chiniot and made his statement (Exh.PA), which was reduced into writing and after endorsing police karvai the same was transmitted to Police Station for registration of formal FIR (Exh.PA/1). Thereafter Investigating Officer prepared injury statement of injured Faheem (Exh.PK) and sent him under the escort of Noor Asif 662/C (PW-9) at THQ Hospital, Bhowana for medical examination. Investigating Officer prepared injury statement of deceased (Exh.PD), drafted inquest report (Exh.PE) and dispatched the dead body to mortuary under the escort of Haq Nawaz 143/C*

(PW-7). From the spot Investigating Officer secured blood stained earth vide recovery memo Exh.PB and prepared rough site plan (Exh.PO). After postmortem examination last worn clothes of the deceased blood-stained shalwar (P-1), blood-stained qameez (P-2) and vest (P-3) were produced before the Investigating Officer, which he took into possession vide recovery memo Exh.PG. He also took into possession last worn clothes of the injured Faheem blood-stained shalwar (P-5), which he took into possession vide recovery memo Exh.PN. On the direction of Investigating Officer and pointing out of the PWs, Riaz Ahmad, Draftsman (PW-5) on 20.08.2011 took rough notes of the place of occurrence and thereafter prepared scaled site plan (Exh.PF and Exh.PF/1), which was made part of the file. Thereafter investigation was entrusted to Muhammad Iqbal, S.I (PW-13), who on 25.07.2014 arrested Shahbaz appellant and obtained his physical remand. During the course of interrogation in pursuance of disclosure on 08.08.2014, Shahbaz, appellant led to the recovery .30 bore pistol (P-6), which Investigating Officer took into possession vide recovery memo Exh.PR.

5. During the course of investigation having found the appellant guilty, Investigating Officer prepared report under Section 173, Cr.P.C. while placing his name in column No.3, which was sent to the court of Sessions en-routed through the Illaqa Magistrate as provided under Section 190(2), Cr.P.C. The learned trial court vide order dated 28.11.2014 formally charge sheeted the appellant to which he pleaded not guilty and claimed trial. Prosecution in order to substantiate its case produced as many as thirteen (13) prosecution witnesses.

6. Occular account in this case consists of the statements of the Noor Muhammad complainant (PW-2) and Faheem Ahmad, injured PW (PW-1). On receipt of complaint, Zafar Iqbal 484/HC

(PW-6) had chalked out formal FIR while Riaz Ahmad, Draftsman (PW-5) had prepared scaled site plan of the place of occurrence. Haq Nawaz 143/C (PW-7) escorted the dead body of the deceased to the mortuary whereas Noor Asif 42/C (PW-9) got medically examined Faheem injured. Investigation in this case was carried out by Muhammad Afzal, Inspector (PW-10) and Muhammad Iqbal, S.I. (PW-13).

Dr. Shagufta Zahoor (PW-3) had conducted postmortem examination on the dead body of Mst. Ghulam Bibi deceased and observed following injuries on her person:-

- “1. A lacerated wound 1.5 cm x 1.5 cm into muscle deep on the left side of chest with inverted margins (wound of entry).
2. A lacerated wound 3 cm x 3 cm into muscle deep with everted margins on the left breast outer side (wound of exit).
3. A lacerated wound of 2 cm x 2 cm bone deep on the outer side of left arm with inverted margins (wound of entry).
4. A lacerated wound of 3.5 cm x 3.5 cm on the inner side of left arm with everted margins (wound of exit), on dissection, left humerus was fractured.
5. A lacerated wound of 1.5 x 1.5 cm on the left lumbar region. Abdominal cavity deep with lacerated wound of 2.5 cm x 2.5 cm with everted margins on left side of lower abdomen. On dissection small (intestines) +large+urinary bladder were injured.
6. A lacerated wound of 1.5 cm x 1.5 cm into muscle deep on the left buttock.

After conducting postmortem examination, doctor rendered the following opinion:-

“In my opinion the cause of death in this case is shock due to internal and external bleeding caused by injury No.5 and caused injuries to the intestines. Injuries No.1, 2 & 4 are Jurh Ghair Jaifa Multlahima u/s 337F(iii), PPC. Injuries No.3&6 are Jurh Ghair Jaifa Hashma u/s 337F(ii), PPC. All the injuries were ante-mortem and caused by firearm weapon.

Probable time that elapsed between injury and death was 1 to 2 hours while between death and postmortem was about 4 to 6 hours.”

Dr. Ghulam Hussain Iqbal (PW-11) medically examined Faheem injured PW and observed following injury on his person.

- “1. A lacerated wound, grazing in nature, 5 cm x 1.5 cm into skin deep, left thigh upper most part with partially inverted margins, common entry and exit wound. Wound is on the outer aspect of left thigh.*

Statements of rest of the prosecution witnesses are formal in nature.

7. The appellant was examined under Section 342, Cr.P.C; wherein he refuted the allegations levelled against him in the prosecution version. He opted neither to appear as his own witness in terms of Section 340(2), Cr.P.C. nor did he opt to adduce defence evidence. While replying to the question why this case against him and why the PWs deposed against him, appellant made the following deposition:-

“All the PWs are related inter-se and inimical to me. On the day of occurrence, I was present in the shop of Muhammad Mansha Bhutta while Ghulam Bibi deceased alongwith an unknown person came there and made a murderous assault upon me. I took my defensive measures and I made fire in the air which hit the roof of the shop of Muhammad Mansha Bhutta. An unknown person snatched my pistol from me. I tried to snatch my pistol from the unknown person. He fired on me which hit Mst. Ghulam Bibi inadvertently. She fell down. Unknown person fled away from the shop and many shop keepers attracted on the crime scene. They escorted the injured

Mst. Ghulam Bibi to the THQ Hospital, Bhowana for first aid where she died. The complainant of the case registered the case against me and all my male family members along with juvenile in connivance with the police. I am innocent.”

8. *After hearing the arguments advanced by learned counsel appearing on behalf of both the parties, the learned trial court, while evaluating the evidence available on record found version of the prosecution proved beyond shadow of reasonable doubt, resulting into conviction of the appellant in the above stated terms.*

9. *At the outset learned counsel for the appellant contended that the impugned judgment has been recorded by the learned trial court in a slipshod manner without adverting to real facts of the case and material available on record. Further contended that story advanced by the prosecution in the crime report does not appeal to reason. It was vehemently argued that the complainant while spreading wider-net involved all male members of the family. Learned counsel contended that while appearing in the witness box, the prosecution witnesses exaggerated the story. As far as medical evidence is concerned, it was argued that the same does not corroborate the prosecution version stricto sensu. Learned counsel argued that as a matter of fact the appellant was present at the shop of Mansha Bhutta where the deceased and Faheem injured made assault upon him and in order to save his life, the appellant exercised the right of self defence. It was argued that this was the first plea of the appellant, which was found correct during the course of investigation. Moreover, during the course of investigation bulk of prosecution version was found false as except the appellant, rest of the accused were found innocent. Furthermore they were acquitted of the charge on the same set of evidence and no appeal against their acquittal was filed. Learned counsel submitted that although pistol is*

stated to have been recovered from the appellant, however, in absence of any matching report, the same is devoid of legal justification. It was finally argued that keeping in view the facts and circumstances at the most case against the appellant attracts the provisions of Section 302(c), PPC.

10. *On the other hand, learned Deputy Prosecutor General assisted by learned counsel for the complainant vehemently opposed the contentions raised by learned counsel for the appellant with the submissions that the appellant is duly named in the promptly lodged FIR with his specific role of inflicting injuries on the person of deceased, which proved fatal. Contended that both the prosecution witnesses of ocular account fully supported the prosecution case on minute details. Further argued that Faheem (PW-1) had received firearm injury during the occurrence, therefore, his presence at the place of occurrence at the relevant time could not be doubted. It was argued by the learned Law Officer that medical evidence fully supports the prosecution version on minute details. Contended that soon after the occurrence, the appellant became fugitive from law and after his arrest, pistol was recovered on his pointing out, which establishes his link with the occurrence. Learned counsel contended that the appellant had committed the occurrence with strong motive. Moreover, during the course of investigation the appellant was found guilty as such his name was placed in column No.3 of the report prepared under Section 173, Cr.P.C. It was lastly argued that in view of overwhelming incriminating material available on record to saddle the appellant with the liability, the learned trial court was rightly justified in recording conviction against the appellant. Learned counsel for the complainant when confronted that whether sentence passed by the learned trial court commensurates with the facts and circumstances of the case, he frankly concedes that from the material*

available on record provisions of Section 302(b), PPC, are not made out.

11. *We have heard the arguments advanced from both sides and perused the record with the able assistance of learned counsel for the appellant, learned counsel for the complainant, as well as, learned Deputy Prosecutor General.*

12. *It is an established principle of law that each criminal case has its own peculiar facts and circumstances and the same seldom coincide with each other on salient features. In the case in hand the occurrence is stated to have taken place on 14.07.2011 at about 4:30 p.m. (after noon) in front of shop of one Mansha Bhutta within the territorial jurisdiction of Police Station Bhowana while the matter was reported to the police at 5:40 p.m. whereas; inter se distance between the place of occurrence and the Police Station is 1/2-KMs. As far as the place of occurrence, time of occurrence and presence of the appellant, as well as, deceased is concerned, that is not denied by both sides. However the only question, which requires determination by this Court, is mode and manner of occurrence as on this aspect stance of both sides is contrary to each other.*

13. *Admittedly the place of occurrence is the shop of Mansha Bhutta. The prosecution version as portrayed in the crime report is that the complainant along with Faheem (PW-1) and Mst. Ghulam Bibi (deceased) after purchasing articles from bazaar were heading towards their house and when they reached near the shop of Mansha Bhutta, the appellant along with other co-accused made assault upon them and on the raising of lalkara by Muhammad Hayat and Jahangir, the appellant, one after the other, made repeated fire shots upon Ghulam Bibi landing on various parts of her body. Moreover, Nawaz, co-accused (since acquitted) was assigned the role of inflicting injury on the person of Faheem injured (PW-1). On the*

other hand, from day one the appellant has taken a specific plea that one Mobushar maternal grandson of the complainant had abducted sister of the appellant and contracted court marriage with her. Few days prior to the occurrence an altercation took place in which the appellant had slapped Noor Muhammad. On the day of occurrence when the appellant was present in front of shop of Mansha Bhutta, Ghulam Bibi deceased and Faheem by launching attack caught hold of him and gave beatings for the insult of Noor Muhammad. The respectables present over there tried to beseech, however, Mst. Ghulam Bibi and Faheem did not leave the appellant. In this backdrop having apprehension to his life, the appellant while exercising right of self defence, made firing, which resulted into injuries on the person of Mst. Ghulam Bibi and Faheem. As per version of the appellant except him no other member of his family was present over there. The Investigating Officer while appearing in the witness-box admitted that in support of version of the appellant, 21 persons had joined into investigation before him. So much so large number of persons had sworn affidavits in support of stance taken by the appellant. However, not a single person had come forward to rebut such plea from the complainant side. Relevant extract out of the statement of Muhammad Iqbal, S.I. (PW-13) reads as under:-

“On 06.08.2014, 21 persons Irfan, Nazeer Ahmed etc. appeared before me and all of them supported the first version of accused Shahbaz. Complainant, the injured, eye-witnesses or any other person from the complainant side did not appear before me to support the complainant’s version as mentioned in the FIR. None from the complainant side appeared before me to negate the above mentioned version of 21 persons who appeared in support of accused Shahbaz. On 06.08.2014 Allah Ditta, Irfan, Nazeer, Zafar Iqbal, Nusrat Liaqat and Zulfiqar submitted their affidavits in support of version of accused by maintaining that they were present at the crime scene at the time of occurrence. They witnessed the occurrence, Mst. Ghulam Bibi the deceased and Faheem

the injured had launched attack on the accused Shahbaz who reacted in order to save his life.

It is correct that none from the complainant side appeared to negate the said affidavits.”

As far as admissibility of the first plea of the accused is concerned, the same is relevant within the meaning of Article 27 of the Qanun-e-Shahadat Order, 1984. Wisdom is sought from the ratio decidendi of august Supreme Court of Pakistan in the case of SHABBIR HUSSAIN alias SUKKU vs. THE STATE (PLD 2003 Supreme Court 368); wherein following principle was laid down:-

“---Art. 19---Relevancy of facts forming part of same transaction---Statements, utterances and declarations in order to be admissible/relevant as “res gestae” should be contemporaneous with the occurrence/incident in issue...”

*In the Indian jurisdiction, in a landmark judgment in the case of C.N. Peters vs. State reported as **1959 AIR (Allahabad) 483 and 1959 Cri LJ 924**) this question was dilated upon in the following terms:-*

“The appellant have a spontaneous explanation right at the moment when the crime was committed and, therefore, his first explanation amounted to res gestae within the meaning of Section 6 of the Indian Evidence Act.”

In a reported judgment in the case of LIAQAT ALI and another vs. THE STATE (1998 P.Cr.L.J 216); following guidelines were given:-

“It may also be added that the statement of an accused person immediately after the occurrence is in a way very relevant fact within the meaning of Article 27 of Qanun-e-Shahadat and as such there can be no legal bar in bringing it on record as an admissible for fact.”

Although it is the prosecution case that besides the appellant, Nawaz armed with pistol, Jahangir (carrying bullet bag) and Muhammad Hayat were present out of whom the appellant and Nawaz had made

firing, however, during the course of investigation, the Investigating Officer opined that except the appellant rest of the accused were not linked with the occurrence. So much so they were acquitted of the charge on the same set of evidence and no appeal against their acquittal was filed meaning thereby that only presence of the appellant was admitted by the learned trial court at the place of occurrence. If the prosecution version, as well as, defence plea taken by the appellant are juxtaposed with the independent facts and circumstances and evaluated on judicial parlance it becomes crystal clear that both sides have not advanced their case with clean hands. Hence, while taking into consideration the material floating on the record, we have persuaded to hold that keeping in view the facts of the case, the evidence floating on record, as well as, other attending circumstances, the learned court below while passing conviction had failed to follow the guidelines given by the superior courts of the country on the subject particularly when it had believed that except the appellant none other accused including Nawaz, who was assigned the role of inflicting injury on the person of Faheem, was present at the place of occurrence. Moreover, during the course of arguments learned counsel for the complainant when confronted frankly conceded that facts and circumstances floating on the record do not attract the provisions of Section 302(b), PPC. Therefore, keeping in view the peculiar facts of the case we have been persuaded to hold that to the extent of the appellant prosecution case only attracts the ingredients of Section 302(c), PPC, therefore, the learned trial court fell in error while convicting him under Section 302(b), PPC. Respectful reliance in this regard is placed on Syed Ali Bepari vs. Nibran Mollah and others (PLD 1962 SC 502); wherein, the august Supreme Court of Pakistan has been pleased to observe as under:-

“Here we may observe that in a case of this type the parties do not generally come out with the true story. It is

a normal incident of an “adversary proceeding” to minimize one’s own part in the incident. In such a case the Court must not be deterred by the incompleteness of the tale from drawing the inference that properly flow from the evidence and circumstances....”

Moreover, in the case of ABDUL KARIM vs. THE STATE (2007 SCMR 1375), it was further held as under:-

“---Ss. 302(b) & 302(c)---Appraisal of evidence---Accused had not acted in a preplanned or premeditated manner to take the life of the deceased in order to saddle him with the criminal liability arising under S.302(b), P.P.C.---Accused in a sudden flare up and in the heat of passion had acted in a manner, which could not be totally justified to bring his case within the ambit of S.302(b), P.P.C.---Injuries on the person of the accused were concealed in the F.I.R. as well as at the trial and despite his arrest on the same day he was not got medically examined---Non-explanation of the said facts by the prosecution had diminished the liability of the accused for the act committed by him---Conviction of accused under S.302(b), P.P.C. was restored to S. 302(c), P.P.C....”

Similarly, in the case of KHADIM HUSSAIN vs. THE STATE (PLD 2010 Supreme Court 669), the august Supreme Court of Pakistan had observed that:-

“---Ss. 302(c)---Qatl-e-amd---Appreciation of evidence--Grave and sudden provocation---Application and scope--Grave and sudden provocation had to be shown distinctly not only that the act was done under the influence of same feeling which had taken away from the accused all control over his actions, but that feeling had an adequate cause.”

14. Hence, while taking into consideration the material available on record, we are of the considered view that as at the most act of Shahbaz appellant, only attracts the provisions of Section 302(c), PPC, therefore, as an abundant caution it would be justified if his sentence is altered accordingly.

While going through the material available on record we have observed that at the time of occurrence the appellant was quite young being 20/21 years of age, hence he is liable to be afforded an opportunity to amend his ways and spend his future life in a better way particularly when there is nothing on record that the appellant has any antecedents of his involvement in any criminal case. Moreover, the occurrence had taken place more than seven years ago and at that time the maximum punishment for the offence was provided up-to 25 years imprisonment, therefore, keeping in view the incarceration already faced by the appellant, it would be justified, if he is sentenced to undergo R.I. for fourteen years. However, the amount of compensation as ordained in the impugned judgment and the effect in non-payment thereof, shall remain intact. However, conviction and sentence recorded under Section 324 and 337-F(i), PPC, are maintained. All the sentences inflicted upon the appellant are directed to run concurrently and benefit of Section 382-B, Cr.P.C is also extended in his favour. Crl. Appeal No.1010-J/2015 filed by the appellant is **dismissed** with above modification in his sentence.

15. Murder Reference No.190/2015 forwarded by the learned trial court in terms of Section 374, Cr.P.C. for confirmation of death sentence inflicted upon the convict is answered in **NEGATIVE**. Death sentence is **NOT CONFIRMED**.

(Muhammad Waheed Khan)
Judge

(Sayyed Mazahar Ali Akbar Naqvi)
Judge

Approved for Reporting

Riaz