

Judgment Sheet

PESHAWAR HIGH COURT, ABBOTTABAD BENCH.

*JUDICIAL DEPARTMENT*

Cr.A No.98-A of 2015

JUDGMENT

*Date of hearing.....16.10.2018.....*

*Appellant... (Muhammad Javed) by Mr. Shah Nawaz Asim,  
Advocate.....*

*Respondent... (The State etc) by M/s Raja Muhammad Zubair, AAG and Shad Muhammad  
Khan, Advocate.....*

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SYED MUHAMMAD ATTIQUE SHAH, J:-


Muhammad Javed, appellant was tried by the learned Additional Sessions Judge-V, Manserra, in case F.I.R No.476 dated 24.11.1997 on the charges under sections 302/452/404/34 PPC, Police Station Shinkiari, District Mansehra, which trial was ultimately culminated upon his conviction and he was sentenced to death on two counts for '*Qatl-i-Amd*' of Abdul Sattar and Mst. Zainab Noor and was also held liable to pay Rs.100,000/-as compensation under section 544-A Cr.P.C, to the legal heirs of both the deceased or in default thereof, to suffer simple

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imprisonment for six months. Appellant was further convicted and sentenced to ten years for sharing common intention with co-accused Nazir for commission of Qatl-i-Amd' of deceased Ghazi. He was also convicted under section 452 PPC and sentenced to seven years and a fine of Rs.30,000/- or in default thereof, to suffer further two months simple imprisonment. All the sentences were directed to run concurrently and benefit of section 382-B Cr.P.C was also extended to the appellant. Being aggrieved, appellant assailed the judgment and order dated 27.07.2015 of the learned Additional Sessions Judge-V, Manshura before this Court in the instant criminal appeal. Similarly, the learned Sessions Judge, Manshura also sent Murder Reference No.03-A/2015 for confirmation of death sentence awarded to the appellant, which are being disposed of through this single judgment.


2. The facts, as narrated in the F.I.R., lodged on the report of Mst. Ashrafa, complainant, are that on 23/11/1997 at '*Kuftan Wela*' she alongwith her other

family members including Abdul Sattar, father-in-law, Mst. Zainab Noor, mother and Mst. Shafia daughter of Abdul Sattar was present in their house; that Abdul Sattar was offering '*Isha Namaz*' and in the meanwhile, the door of the house was knocked, Abdul Sattar took lantern and went out and suddenly Mehboob, Javed sons of Jumma and Nazir son of Mehboob duly armed with machines opened firing at him, who died on the spot; that all the three accused entered the house, and her mother Mst. Zainab Noor prevented them not to enter inside the house; that Mehboob and Javed fired at her who also died with the their firing on the spot; that Mst. Shafia, her sister went out of the house from other side to inform Ghazi, their relative about the murder of both the deceased; that Ghazi alongwith her wife Mst. Gul Jan attracted to the spot where Nazir fired at Ghazi with his machine, who died there, while all the three accused gave butt blows with their machines to Mst. Gul Jan, who sustained injuries; that while going back the accused took three '*tolas*' gold ornaments alongwith



twelve kilogram '*Desi Ghee*' and cash amount of Rs.4,000/- from their house. Motive for the offence was stated to be the pressure of the appellant alongwith other co-accused for compromise with Munshi etc through Abdul Sattar. The report of complainant was recorded by Gulzar Khan, ASHO on the spot on 24.11.1997 at 13.30 hours in shape of '*Murasila*' (Ex.PW 2/1), and the case was registered vide FIR (Ex.PW 11/1).

3. After the occurrence, the present appellant went into hiding alongwith his co-accused. However, later on he was arrested and after completion of investigation in the case, supplementary challan was submitted against him before the learned trial Court. Appellant was formally charged by the learned trial Court for causing '*Qatl-i-Amd*' of three deceased Abdul Sattar, Zainab Noor and Ghazi and causing injury to Mst. Gul Jan and taking away cash amount of Rs.4,000/- three '*tolas*' of gold ornaments and '*Desi Ghee*' weighing twelve kilogram, under sections



302/337-A(i)/452/404/34 PPC, to which he pleaded not guilty and claimed trial.

4. The prosecution, in order to prove its case, examined as many as eleven witnesses, which include Amjad Hussain, SDPO Pattan (PW-1) has submitted supplementary challan against the appellant; Mst. Ashrafa, (PW-2) reiterated her narration given in the F.I.R being complainant and furnished ocular account alongwith other eyewitness Mst.Shafia, (PW-3) and both charged the appellant for commission of offences; Lady Doctor Naila Taranum, Senior Medical Officer (PW-4) conducted postmortem examination on the dead body of deceased Mst. Zainab Noor; Guldar Khan, retired Inspector (PW-5) was marginal witness to recovery memos (Ex.PW 5/1 & Ex.PW 5/2); Doctor Shamim Afzal (PW-6) furnished medical evidence as he had conducted autopsy on the dead body of deceased Abdul Sattar and Ghazi; Gulzar Khan, retired S.I (PW-7) conducted investigation in the case, during which he drafted '*Mursila*' (Ex.PW 2/1), prepared injury sheet of injured Mst. Gul Jan

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(Ex.PW 7/1), injury sheets and inquest reports of deceased Ghazi, Abdul Sattar and Mst. Zainab Noor (Ex.PW 7/2 to Ex.PW 7/7), prepared site plan (Ex.PW 7/7), secured blood stained articles vide recovery memos (Ex.PW 7/8, Ex.PW 5/1 and Ex.PW 5/2) and empties from the spot vide recovery memos (Ex.PW 7/9); drafted application for sending empties and blood stained articles to FSL, Peshawar and received result (Ex.PW 7/10 to Ex.PW 7/12); Fazal-ur-Rehman Khan S.I (PW-8) recovered 'kalashnikov' on the pointation of appellant vide recovery memo (Ex.PW 8/1) with sketch of the place of recovery (Ex.PW 8/2); Muhammad Rafique (PW-9) was marginal witness to recovery memos (Ex.PW 7/8 and Ex.PW 7/9); Muhammad Noor (PW-10) had identified the dead bodies of the deceased and Shah Jehan Khan (PW-11) had registered the case vide F.I.R (Ex.PW 11/1) on the basis of 'Murasila' (Ex.PW 2/1).

5. After close of prosecution evidence, statement of the appellant/convict was recorded under Section 342 Cr.P.C, wherein, he denied the allegations of the

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prosecution and pleaded innocence. However, he wished not to produce defence evidence or to appear as his own witness on Oath under section 340(2) Cr.P.C.

6. Arguments of learned counsel for the parties heard and record perused with their valuable assistance.

7. In this unfortunate incident, three persons, namely, Abdul Sattar, Mst. Zainab Noor and Ghazi have lost their lives and one female got injured. The present appellant Muhammad Javed alongwith his brother Mehboob (convicted accused) and nephew Nazir (absconding accused) have been charged for the offences. The report of the occurrence was lodged by Mst. Ashrafa, complainant (**PW-2**) daughter-in-law of deceased Abdul Sattar, who alongwith Mst. Shafia (**PW-3**) furnished ocular version of the occurrence. The testimony of both the eyewitnesses was consistent, confidence inspiring and trustworthy. The defence pointed out that delay in lodging the F.I.R was material and argued that case was registered after consultation

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and deliberation, however, this Court considers that peculiar facts and circumstances of the case itself explained the delay and the defence could not succeed to prove any consultation, deliberation or premeditation on the part of the complainant to falsely charge the appellant in the case. It is not possible in ordinary course of the life or even not appealable to a prudent mind that actual and real culprit is left and in place thereof innocent person is charged. The appellant was residing in the same vicinity and well known to the complainant and eyewitness of the occurrence. The appellant was duly identified in the light of lantern, which was taken into possession by the I.O during investigation. The medical evidence also supported the version of the complainant and there was no mentionable contradiction in the statements of the eyewitnesses, who are natural and both the witnesses have established their presence at the spot at the time of occurrence. Since the occurrence had happened in the year, 1997 and the eyewitnesses furnished their testimony after lapse of eighteen years, minor





discrepancy or contradiction in such a situation is possible and the same is not material to discard their evidence. The ocular account furnished by the eyewitnesses was also corroborated through other circumstantial evidence i.e. recoveries of blood stained articles, empties etc from the spot. Thus, this Court in the light of above discussion is of considered opinion that the charge against the appellant-convict Muhammad Javed has been proved beyond any shadow of doubt and the findings of the learned trial Court qua his conviction are based on proper appreciation of evidence and the law applicable thereto, which needs no interference by this Court in its Appellate jurisdiction to that extent.

8. However, the question left to be determined and considered by this Court is whether quantum of sentence awarded to the appellant, Muhammad Javed was legally justified in the circumstances of the case in view of the principles enunciated by the august Apex Court in this respect. This Court considers that the motive could not be proved by the prosecution through

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cogent and reliable evidence during trial. It is well settled that once motive was alleged by the prosecution, then it was under legal obligation to establish the same. This Court is of the considered opinion that death penalty amounts to deprive a person of his life, therefore, the Courts have to take great care and caution, while awarding such capital punishment to an accused person and to ensure that the evidence which is being made basis for capital punishment is consistent, cogent, reliable, independent and confidence inspiring and coming through unimpeachable source. In these peculiar facts and circumstances, and particularly in absence of any deep routed blood feud enmity, this Court considers that death sentence awarded to the appellant-convict by the learned trial Court was not legally justified. In case of Allah Wasaya and another vs. The State (2017 SCMR 1797), the Hon'ble Apex Court, while considering lack of direct motive against appellant Allah Wasaya, as mitigating circumstance, altered the sentence of death to imprisonment for life on two

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counts. Reliance in this respect is also placed on case titled *Ijaz Ahmad Vs. The State* (2017 SCMR 1941), *Amanat Ali Vs. The State* (2017 SCMR 1976), *Fayyaz alias Faizi Vs. The State* (2017 SCMR 2024), *Rehmat Khan Vs. The State* (2017 SCMR 2034), *Saifullah Vs. The State* (2017 SCMR 2041) and *Ghulam Muhammad Vs. The State* (2017 SCMR 2048).

10. Apart from the above, the Hon'ble Supreme Court of Pakistan in a case reported as 2009 SCMR 1188 titled "*Mir Muhammad alias Miro Vs. The State*" has held that it will not be out of place to emphasize that in criminal cases, the question of quantum of sentence requires utmost care and caution on the part of the courts, as such decisions restrict the life and liberties of the people. Indeed the accused persons are also entitled to mitigating benefit of doubt to the extent of quantum of sentence.

11. Before parting with the judgment, it may be mentioned here that initially, co-accused Mehboob was

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arrested in this case and his trial was conducted by the learned trial Court, who was subsequently convicted and sentenced to death in this case vide judgment dated 18.04.2008. The conviction and sentence of said co-accused was maintained by this Court and Criminal Appeal No.15/2008 was dismissed by this Court vide judgment dated 19.01.2011 and death sentence awarded to Mehboob was confirmed. However, the august Apex Court has reduced the sentence of death to that of life imprisonment in respect of convict Mehboob Criminal Appeal No.397 of 2011 filed by him. The relevant extract of the judgment of the august Apex Court is reproduced below:

*“After hearing the learned counsel for the parties and going through the record we have observed that according to the prosecution three assailants had caused multiple injuries to four victims and it had nowhere been specified at any stage of this case as to which one of the assailants had caused which injury to the victim. It is, thus, not clear as to where the appellant had caused any injury to any victim which injury had proved fatal. This Court has already held that where it is not clear in a case as to which one of the accused persons had caused the fatal injury to the deceased there the sentence of death may be withheld by way of abundant caution and a reference in this respect may be made to the cases of*

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Muhammad Latif and another v. The State (1984 SCMR 284), Saeed and others v. The State (1984 SCMR 1069), Allah dad and another v. The State (1995 SCMR 142 and Muhammad Younis v. Ashiq Hussain and others (PLJ 2007 SC 424).

Apart from what has been observed above even according to the prosecution itself the animosity of the appellant and his co-accused was directed against some others and not against the victims of the present case and the said victims had statedly been harmed by the appellant and his co-accused only because they had not been able to play a role in getting the matter settled between the accused party of this case and its enemies. WE have found it to be rather difficult to believe that the victims of this case had been harmed by the accused party in such a background. It appears that there was some other background between the parties which background had been suppressed. It is also settled by now that if the prosecution asserts a motive but fails to prove the same then ordinarily this may be a factor to be considered in respect of reduction of the convict's sentence of death to imprisonment for life on the charge of murder. A reference in this respect may be made to the cases of Ahmad Nawaz v. The State (2011 SCMR 593), Ifthikhar Mehmoode and another vs. Qaiser Ifthikhar and others (2011 SCMR 1165), Muhammad Muntaz v. The State and another (2012 SCMR 267), Muhammad Imran (a) Asif v. The State (2013 SCMR 782), Sabir Hussain alias Sabri v. The State (2013 SCMR 1554), Zeeshan Afzal alias Shani and another v. The State and another (2013 SCMR 1602), Naveed alias Needu and others v. The State and others (2014 SCMR 1464) and Muhammad Nadeem Wagas and another v. The State (2014 SCMR 1658).....

*In view of the circumstances of the case mentioned above we have decided to exercise caution in the matter of the appellant's sentences of death. This appeal is, therefore, dismissed to the extent of the convictions and sentences of the appellant recorded and upheld by the courts below except to the extent of the sentences of death passed against the appellant on two counts of the charge under section 302(b), PPC which sentences of death are reduced to imprisonment for life on each such count. All the sentences of imprisonment passed against the appellant shall run concurrently to each other and the benefit under section 382-B, Cr.P.C shall be extended to him. This appeal is disposed of in these terms."*

12. Thus, in view of above discussion and decision of the august Apex Court in the case of convict co-accused, Mehboob, this appeal is partially allowed and the sentences of death on two counts under Section 302(b) PPC, are altered to that of imprisonment for life. However, all other sentences awarded to the appellant by the learned trial Court shall remain intact.

Murder Reference No.03-A/2015 sent by the learned Sessions Judge, Manshra under Section 374 of the Criminal Procedure Code, 1898 for confirmation

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of death sentence awarded to appellant **Muhammad Javed son of Jumma**, is answered in negative.

Above are the detailed reasons for short order of this Court of even date.

  
JUDGE

  
JUDGE

Announced.  
**Dt.16 /10/2018.**  
/\*M. Saleem\*/

(DB) Mr. Justice Syed Muhammad Attique Shah & Mr. Justice Syed Arshad Ali