4+10+1 = 15

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Bench
Mr. Justice Jamal Khan Mandokhail
Mr. Justice Syed Hasan Azhar Rizvi
Ms. Justice Musarrat Hilali

(AFR)

Criminal Appeal No. 56/2019
(Against the judgment dated 21.03.2013 of the Lahore High Court, Lahore passed in Crl. Appeal No. 91/2018 ad MR No. 54/2008)

Ghulam Rasool ***...Appellant***

Versus

The State ***...Respondents***

For the Appellant: Mr. Munir Ahmed Bhatti, ASC

For the Complainant: Mr. Shah Khawar, ASC

For the State: Mr. Irfan Zia, DPG Punjab

Date of Hearing: 27.03.2024

ORDER

Jamal Khan Mandokhail, J.- Brief facts of the case are that an FIR No. 127 dated 10.05.2002 was registered by one Muhammad Ilyas ('complainant') under sections 302, 109 and Pakistan Penal Code (PPC) at Police Station, City Samundri, District Faisalabad against the appellant, co-accused Muhammad Shafique and two unknown persons. It is alleged that the appellant made firing upon Haji Muhammad Ishaq and Mushtaq Ahmad, who fell down and thereafter, the other co-accused also made indiscriminating firing as a result whereof, Haji Muhammad Ishaq and Mushtaq Ahmad succumbed to their injuries. The appellant absconded whereas, Muhammad Shafiq was arrested. He faced trial and was acquitted of the charge by the Trial Court.

2. The appellant was subsequently arrested on 25 May 2006. During the investigation, upon a disclosure of the appellant, a 12. bore gun allegedly used in the commission of the offence was recovered on his pointation. After completion of the investigation, a

report under section 173 of the Code of Criminal Procedure (Cr.PC) was submitted before the Court of Additional Sessions Judge, Faisalabad (Trial Court). After conclusion of the trial, the appellant was convicted under section 302(b) PPC and was sentenced to death on two counts by the Trial Court, *vide* judgment dated 26.01.2008. An appeal filed by the appellant was dismissed by the High Court, maintaining the judgment of the Trial Court and answered the Murder Reference in affirmative through the impugned judgment. Feeling aggrieved, a petition for leave to appeal was filed, wherein leave was granted.

3. Arguments heard and have perused the record. In order to prove its case, out of the three eye-witnesses, the prosecution has produced Muhammad Ilyas, PW-10, Muhammad Amjad, PW-11. According to the eye-witnesses and as per the FIR, the appellant made four successive fire shots upon the person of Mushtaq Ahmad and five successive fire shots upon Muhammad Ishaq who fell down, whereafter, the other three co-accused also made indiscriminate firing upon the deceased. Therefore, it cannot be said with certainty that out of all the four assailants, how many shots were fired and whose fire shot had resulted into causing death of the deceased. As far as the recovery of a crime weapon is concerned, it is the case of the prosecution that the appellant fired shots with rifle, however, there is a divergent version on the record qua the recovery of gun 12 bore and a pistol instead of gun 12 bore and that too had not been sent to Forensic Science Laboratory for examination, hence the recovery of crime weapon is inconsequential. Therefore, the High Court has rightly disbelieved the recovery.

4. Facts and circumstances of the case, lead us to a conclusion that the occurrence had taken place all of a sudden without there being any proof of premeditation. It was a free fight, without any motive. On the basis of the available material, it is proved that all the accused committed firing upon the deceased, but it is not established that the appellant alone was responsible for the commission of the murder or the injury caused due to his firing was fatal. However, the prosecution has succeeded in proving its case against the appellant under section 302(b) read with section 34, PPC for the act done by him along with the co-accused. In view of the facts and circumstances discussed herein above, there are reasonable grounds for mitigation. Thus, awarding capital punishment to the appellant in the given circumstances, is unjustified. The fora below were required to have had exercised their discretion by awarding lesser punishment as provided by section 302(2), PPC, but the needful was not done.

5. Even otherwise, the appellant was arrested in the month of May 2006 and it took two years to complete his trial in the year 2008. The appeal filed before the High Court remained pending for more than five years till its dismissal. The petition for leave to appeal filed against the impugned judgment before this Court in the year 2013 was fixed for hearing for the first time on 28 January 2019, and leave was granted. Lastly, the case was heard finally on 24 March 2024. The appellant remained in custody w.e.f. May 2006 till date, out of which, he was incarcerated in death cell w.e.f. 2013, almost for more than eleven years, for no fault of his. Section 302(b), PPC provides a punishment for death or imprisonment for life as *Taazir*. If an accused is sentenced to death, he is shifted to a death cell and while incarcerated, he is not entitled for remissions. On the other hand, if an accused is

sentenced to imprisonment for life, he is detained in normal jail and is also entitled for remissions as per the law. The appellant has served almost an imprisonment for life, including eleven years detention in death cell. Under such circumstances, executing his death sentence at this stage would be harsh, especially, when there are mitigating circumstances as well. Reliance in this behalf can be placed upon the judgment of this Court passed in the case of Ghulam Shabbir[1].

Thus, in view of the above, the appeal is dismissed. The conviction awarded to the appellant under section 302(b), PPC on two counts is maintained, however, the sentence of death awarded to the appellant is altered to that of imprisonment for life on two counts. All the sentences awarded to the appellant, that is, in FIR No. 51 dated 02.03.2000 (Criminal Appeal No. 57/2019) and FIR No. 127 dated 10.05.2022 (the subject appeal) shall run concurrently with the benefit of section 382-B, Cr.PC.

Sd/— J

I am filing my separate dissenting note containing detailed reasons.

Sd/— J

Sd/— J

Announced in Open Court on 16.09.24
At Islamabad

Sd/— J

Not Approved for Reporting
Rizwan

[1] Ghulam Shabbir v. The State (Crl.R.P. 103/2017)
https://www.supremecourt.gov.pk/downloads_judgements/crl.r.p._103_2017.pdf

JUDGMENT

Syed Hasan Azhar Rizvi, J:- I have had the privilege of going through the judgment (**"majority judgment"**) authored by my learned Colleague Mr. Jamal Khan Mandokhail, J. With great respect, I do not find myself in agreement to it for the facts and reasons mentioned herein.

2. Facts in brief are that an FIR No. 127 dated 10.05.2002 under section 302 and 109 of the Pakistan Penal Code, 1860 **("PPC")** was registered by one Muhammad Ilyas **("Complainant")** at the Police Station, City Samundari, District Faisalabad against the appellant, co-accused Muhammad Shafique and two unknown persons. The allegation against the appellant and the co-accused persons is that on 10.05.2002, at approximately 6:30 a.m., Haji Muhammad Ishaq and his son, Mushtaq Ahmed (both now deceased), were present at their shop when the appellant, armed with a rifle, along with three co-accused persons including Muhammad Shafiq and two unknown, each carrying .30 bore pistols, raised a *lalkara*. The appellant then fired four consecutive shots at Mushtaq Ahmed and five shots at Muhammad Ishaq, causing both to fall. Subsequently, the co-accused persons indiscriminately fired upon them leading to their deaths. Following the incident, the appellant absconded from the place of incident, while co-accused Muhammad Shafiq was apprehended and faced trial but was acquitted of the charges.

3. The appellant was arrested on 25.05.2006 and after a full-fledged trial he was convicted and sentenced to death penalty by the Trial Court. The death sentence was subsequently confirmed by the High Court, and his appeal against the conviction was dismissed.

4. Although the majority judgment recognizes that the prosecution effectively established its case against the appellant, however, it has, in light of following consideration of mitigating circumstances, altered the death sentence to life imprisonment.

i) That it remains uncertain how many shots were fired by each of the four assailants, and it is unclear whose shot caused the deaths of the victims.

ii) That the incident occurred spontaneously, with no evidence of premeditation, and it was deemed a free fight without any discernible motive.

iii) That co-accused Muhammad Shafiq has been acquitted.

iv) That there were considerable delays in the conclusion of trial and hearing of appeal consequently the appellant remained in custody w.e.f. May 2006 till date.

I find myself unable to concur with any of these considerations.

5. Perusal of the record demonstrates that in order to prove the case, the prosecution produced sixteen witnesses during the trial. Complainant Muhammad Ilyas (PW-10), Muhammad Amjad (PW-11) and Aslam are the eye-witnesses. The occurrence in this case took place in front of the shop owned by the Muhammad Ishaq and Muhammad Mushtaq (deceased persons). All eye-witnesses are residents of the same area. Furthermore, Muhammad Ishaq, one of the deceased, was the maternal uncle of both Muhammad Ilyas and Muhammad Amjad, making their presence at the shop neither unnatural nor improbable. The appellant is named in the FIR with specific role of causing successive firearm injuries on the deceased persons. The relevant part of the testimony of the complainant Muhammad Ilyas (PW-10) is reproduced below for the ease of reference:-

> *"... On 10.05.2006, at about 06:30 a.m, Mushtaq was standing in the street, while Ishaq was in his shop. I, Amjad and Aslam were standing in the outer door of Ahata near the shop of Muhammad Ishaq and were talking with each other. All of sudden, we hear lalkara and saw in the street that Ghulam Rasool accused present in the Court, armed with rifle alongwith Muhammad Shafiq accused since acquitted armed with pistol and two unknown persons duly armed with pistols to whom I can identify if confronted. In our view, the accused Ghulam Rasool made four fire shots with his rifle at Mushtaq Ahmad, which hit him below the right ear, left ear, neck and chest. Mushtaq Ahmed fell down. Thereafter accused Ghulam Rasool made five fire shots upon Muhammad Ishaq my mamoon, which hit on his above left eyebrow, forhead, neck and chest. Muhammad Ishaq fell down on the ground in the shop. Then Shafique and two unknown persons started firing which hit on different parts of bodies of Muhammad Ishaq and Muhammad Mushtaq. ..."*

This version was supported by the testimony of the second eye-witness, Muhammad Amjad (PW-11). Both witnesses provided consistent ocular account on details of the case, such as the incident's location, the weapon used by the appellant, the timing, and the sequence of events. Their testimonies were straightforward and convincing. Even after undergoing extensive and rigorous cross-examination, both witnesses remained steadfast and demonstrated a high degree of reliability and consistency in their testimony.

6. The ocular account furnished by the eye-witnesses finds full corroboration by the medical evidence provided by Dr. Muhammad Ayub (PW-12). Dr. Ayub conducted the post-mortem examination on Muhammad Ishaq on 10.05.2002 and identified the following injuries:

> *1-A. A firearm wound of entry 2 x 2 cm present on the medial side of left eye brow, with burnt inverted margins deep going to injury No.1-B which, was wound of exit 5 x 3 cm with everted margins present on the top of head with protrusion of brain matter.*
>
> *2-A. A firearm wound of entry 2 x 2 cm above the left eye brow with burnt inverted margins, deep going to the injury No.2-B, which was a firearm wound of exit 5 x 3 cm on the top of head - joining with wound-ofexlt wound of injury No.1-B.*
>
> *3-A. A firearm wound of entry 2 x 2 cm with burnt everted margins on the left side of neck 3 cm below to left ear, deep*

going to injury No.3-B, which was firearm wound of exit with everted margins present 3 cm above the medial end of right collar bone with hole in Qameez.

4-A. A firearm wound of entry with burnt edges 1 x 1 cm on right front of chest 2 cm below the medial end of right collar bone deep going to the injury No.4-B. Firearm. wound 1½ x ½ cm on the medial border of right axilla with corresponding hole in Qameez.

5-A. A grazing firearm wound 4 cm x 1 cm with everted margins on the outer lower right forearm.

Thus, specific injuries attributed to the appellant by the eye-witnesses find corroboration from the post-mortem report. Based on the post mortem report, Dr. Ayub rendered the opinion as reproduced below:-

Opinion: After internal and external post mortem examination of the dead body, the cause of death in the opinion of PW-12 was haemorrhage and shock as the result of injuries No.1 to 5. In ordinary course of nature, the cause of death. Injury Nos.1, 2 and 3 are individually fatal while injury No.4. and 5 were simple.

7. Moreover, following injuries were found on the dead body of the Muhammad Mushtaq:-

1-A. A firearm wound of grazing 13 x 3 cm with burnt everted edges muscles, deep on the left side the chest start from 3 cm below the left eye. Lacerating left ear and on left side of neck.

2-A. A firearm wound of entry ½ x ½ cm with burnt inverted margins on left side of base of neck 1 cm above the left clavicle collar bone deep going upto the Injury No.2-A, which, was firearm wound of exit 2 x 2 cm with everted margins 3 cm back to right ear.

3-A. A firearm wound of entry with burnt everted margins on neck on front left side of chest, 2 cm below the collar bone, deep going to the injury No.3-B, which was a firearm wound of exit 1 x 1 cm on the front of right side of chest, 3 cm medial to right axilla with corresponding holes in Qameez.

4-A. A firearm grazing wound 5 x 2 cm muscle deep with Inverted margins present on the upper 1/3rd of right upper arm, on inner side below the axilla (pit) with corresponding holes in Qameez.

5. A firearm wound of entry with burnt edges Inverted 3 x 2 cm present on the right side of head 1 cm below the right ear with cutting of lower 1/3rd of right ear deep going to the skull."

Based on the findings detailed in the post-mortem report, Dr. Ayub provided the following opinion:

> *"Opinion: After internal and external post mortem examination of the dead body, the cause of death was haemorrhage and shock as the result of injuries No.1 to 5 which were sufficient in ordinary course of nature to cause death. Injury Nos.2,3, and 5 are individually fatal while injury No.1 & 4. were simple in nature All injuries were ante-mortem and caused by firearm."*

Thus, perusal of the evidence indicates that specific injuries attributed to the appellant were sufficient in ordinary course of nature to cause death.

8. The motive behind the occurrence, as per prosecution case, was that Muhammad Ishaq deceased was the complainant in the case FIR No. 51/2000 registered under section 302/109/201 PPC at Police station Samundari City against the appellant. The appellant threatened Muhammad Ishaq the deceased, not to pursue the said case and due to this grudge the appellant committed murder of Muhammad Ishaq and Mushtaq Ahmed. The motive was proved by the witnesses as revealed by their testimonies. For ready reference the relevant portions from the cross examination of the Muhammad Ilyas (PW-10) is reproduced below:-

> "...It is correct that Farman Ali deceased was murdered by on the 2/3/2000 and case was registered against Ghulam Rasool etc, in which Muhammad Ishaq deceased was the complainant ... .
> "... It is incorrect to suggest that no proceedings in the case of Farman Ali deceased was in progress during the days of occurrence of instant case. It is incorrect to suggest that Muhammad Ishaq deceased was not gone anywhere to follow the case of murder of Farman."

9. Perusal of the evidence clearly demonstrates that the motive is firmly established and was correctly upheld by the High Court. Given the evidence and facts of the case, it is impossible, by any stretch of the imagination, to consider the incident as a mere spontaneous fight or an act of unpremeditated murder.

10. As far as acquittal of the Muhammad Shafiq (co-accused) is concerned, it is pertinent to highlight that his case is quite distinguishable from the appellant. Muhammad Shafiq was not implicated in causing any specific injuries to Muhammad Ishaq or Mushtaq Ahmed, whereas the appellant was directly attributed with the role of inflicting firearm injuries. The role assigned to Muhammad Shafiq was not substantiated by the medical evidence, in contrast to the appellant's role, which is fully supported by such evidence. Additionally, no motive was established against Muhammad Shafiq, whereas a specific motive was clearly identified in relation to the appellant. Consequently, as Muhammad Shafiq's case is fundamentally distinct from that of the appellant, his acquittal holds no bearing on the appellant's case.

11. As far recovery of weapon of crime is concerned, it was rightly disbelieved by the *lower fora.* It has been rightly held by the High Court that even if recovery is excluded there is sufficient incriminating material against the appellant in the form of testimony of eye-witnesses corroborated by the medical evidence and motive. Reference in this regard may be made to the case of *Mukhtar Ahmed v. The State* **(2004 SCMR 220)** wherein it has been observed that:-

> "2. We have gone through the evidence of these two witnesses and find that the same, inspires confidence and presence of these two witnesses at the spot at the relevant time is also proved beyond any doubt. The only defence plea raised in the crossexamination of P. W.6 by the petitioner was that on the day of occurrence, there was cross -firing between Nathoo party and Haji Sultan Mughal party and that the deceased was hit by bullet on account of this cross-firing. No suggestion was made that the cross-firing took place at 6-00 a.m. when the incident took place.
> 3. When questioned, learned counsel frankly admitted that no report or F.I.R. was lodged for the said cross-firing on the said date in the village by anyone. He however, submitted that no recovery of .7 mm rifle was made which was allegedly used by the petitioner. He also admitted that no empty from the spot was also recovered, therefore, in our view, non-recovery of weapon of offence in the

> circumstances of the case was not fatal to the prosecution case. The ocular account given by the witnesses was such which could be sufficient to bring home guilt to the petitioner."

12. In the case of *Miss Najiba and another vs. Ahmed Sultan Alias Sattar and 2 others* **(2001 SCMR 988)** it has been noted that:-

> "6. It is obvious from the above-cited case-law that it has been consistently held that when prosecution proves its case beyond any doubt then it is the legal duty of the Court to impose deterrent punishment on the offenders to make the evil doers an example and a warning to the likeminded people. 'Despite the fact that the crime is increasing in the society yet the Courts normally avoid to award normal penalty of death in offences punishable with death which amounts to gross miscarriage of justice whereas the Courts are duty-bound to do complete justice with both the parties. It has been observed with great concern that whenever people fail to get due justice from the Court of law, they resort to take the law in their own hands to settle their matters themselves. Such a situation is very alarming and it is the need of the hour that the Courts should hold the scale of justice even in dispensation of justice to the parties. In offences punishable with death, the normal penalty prescribed by law is death sentence, however, in cases where there are mitigating or extenuating circumstances warranting lesser punishment, the Courts while awarding lesser punishment have to record reasons justifying the same."

As demonstrated by the prosecution's evidence, the appellant committed murder in a particularly brutal and merciless manner, killing two individuals who were actively pursuing a case against the appellant for a previous murder of Farman Ali deceased. Given the gravity of the offence and the appellant's conduct, he is not entitled to any leniency in sentencing.

13. An important question that needs determination is that whether a delay in trial or deciding the appeal in the cases of death sentence constitutes a mitigating circumstance to award a lesser punishment. A similar question came up before the Supreme Court of Pakistan in the case of *Muhammad Hassan vs. The State* **(1973 SCMR 344)** wherein it has been observed that:-

> "Sh. Shaukat Ali, learned Advocate appearing on behalf of the petitioner has not disputed before us the conviction of the petitioner for the murder of the two girls. He has,

> however, contended that in the facts and circumstances of the case the petitioner should not have been awarded the extreme penalty of law, namely, death. He has contended in the first instance, that having regard to the fact that a long time had elapsed between the occurrence and the sentence of death passed upon the petitioner, the High Court should not have confirmed the death sentence. He has submitted that the occurrence took place on the 3rd of November 1969, and the petitioner was convicted and sentenced to death on the 19th of May 1971, by the trial Court and his death sentence was confirmed by the High Court on the 30th of September 1972. In support of this contention he has drawn our attention to Chapter 24-B, Rule 6 of the Rules and Orders of the High Court of Judicature at Lahore, Vol. III, which says that the High Court requires explanations to be furnished in monthly Sessions Statements of any cases pending over two months...
> We do not find any substance in this contention. The afore said rules of the High Court do not authorise the High Court to commute the sentence of death to transportation for life or life imprisonment merely on account of delay in the disposal of the case the explanations required under the aforesaid rule 6 are for the purpose of securing the disposal of Sessions cases with the greatest possible expedition as indicated in Rule 1. Having regard to the large number of such cases pending before the High Court it would indeed be a dangerous proposition to lay down that mere delay in the disposal of a death sentence case would entitle the condemned person to automatically obtain commutation of his death sentence."

Moreover in the case of *Samano v. The State* **(1973 SCMR 162)** it was ruled that:-

> "I am, therefore, of the view that both the appellants have been rightly convicted and no distinction can be made between the two. As regards the sentence, it is true that the incident took place as long ago as November 1954, but the mere length of time taken in concluding the trial and in deciding the appeals filed by the appellants would not by itself constitute an extenuating circumstance justifying the imposition of the lesser penalty. The appellants acted in a cruel and cold-blooded manner by allowing themselves to be hired as assassins. They do not deserve any leniency in the matter of punishment. I would, therefore, maintain their sentences and dismiss both the appeals."

Similar view was also taken in the case of *Shah Muhammad v. The State* **(PLD 1973 SC 332)** as reproduced below:-

> In this view of the matter, we have, after giving our anxious consideration to all the facts and circumstances of the case and the able arguments advanced on behalf of the appellant, come to the conclusion that this appeal must fail and accordingly dismiss it. The convictions and sentences of the appellant are upheld. The fact that more than 4 1/2 years have elapsed since his conviction is not a circumstance, which we can take into consideration. If the delay in the execution of the sentence can by itself be a sufficient ground for commutation then the appellant can approach the Executive authorities for such commutation; but, so far as this Court is concerned, it cannot, in the

> facts and circumstances of this case, recommend any such action.

In the case of *Bakshish Elahi v. The State* **(1977 SCMR 389)** it was noted that:-

> "The Legislature has conferred very wide discretion on the Courts in the matter of sentences under the Penal Code, but as the discretion has to be exercised judicially, the Courts would be entitled to take into account the law and order situation, if the object of punishment or one of the objects of punishment be to deter the commission of further crimes. Now, I do not see how there can be any doubt about this question. Salmond observes in his book on Jurisprudence (Tenth Edition) at page 111 "Punishment is before all things deterrent, and the chief end of the law of crime is to make the evil doer an example and a warning to all that are likeminded with him" would agree with this passage, and the learned Single Judge yeas justified in holding that a severer sentence was necessary on account of the increase of crime, provided of course culpable homicides of the type under consideration have increased, as held by the learned Single Judge."

14. In the present case, the prosecution clearly demonstrated that the appellant, along with others, was involved in a deliberate and premeditated murder. Because of the brutality and dangerousness of the act committed intentionally by the appellant, it is necessary to impose the strict punishment i.e. capital punishment, in order to deliver justice and protect society.

15. Mitigating the punishment based on the long trial or the time the appellant spent in custody does not change the severity of the crime. While it is unfortunate that the appellant is in custody for a long time due to delays in the trial and appeals, however it does not justify leniency. The length of time in custody is a result of the legal process and cannot be considered by any cannons of interpretation to be an indication that the crime committed by the appellant is not serious. On perusal of the clear evidence of the appellant's involvement in a brutal murder, the death penalty remains the appropriate and necessary punishment. The appellant is a habitual criminal of committing the murder of the innocent persons. Therefore, reducing the sentence would

undermine the justice deserved by the victims and the severity of the crime committed.

16. In light of the above discussion, I find that both the Trial court and the High Court have thoroughly examined all aspects of the case, appreciated the evidence, and have rightly imposed the death penalty as a just and appropriate sentence.

17. Consequently, this appeal is dismissed and death penalty imposed by the learned High Court is maintained.

(Syed Hasan Azhar Rizvi)

JUDGE

Islamabad
Paras Zafar, LC/-

NOT APPROVED FOR REPORTING

18/9/24

ORDER OF THE COURT

By majority of 2 to 1 (Syed Hasan Azhar Rizvi, J. dissenting), the appeal is dismissed. The conviction awarded to the appellant under section 302(b), PPC on two counts is maintained, however, the sentence of death awarded to the appellant is altered to that of imprisonment for life on two counts. All the sentences awarded to the appellant, that is, in FIR No. 51 dated 02.03.2000 (Criminal Appeal No. 57/2019) and FIR No. 127 dated 10.05.2022 (the subject appeal) shall run concurrently with the benefit of section 382-B, Cr.PC.

Islamabad
16th September, 2024
16/9/24