IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, C.J.
MR. JUSTICE TARIQ PARVEZ
MR. JUSTICE GHULAM RABBANI

Criminal Appeal No.652 of 2009
In Jail Petition No.127 of 2009
(On appeal from the judgment dated 19.01.2009 passed by the Lahore High Court, in Crl.Appeal No.590/2003)

Khizar Hayat

.....Appellant (s)

Versus

The State

.... Respondent

For the appellant(s): Mr. Aftab Ahmed Khan, ASC

For the State: Mr. M. Irfan Malik, Addl. P.G. Pb.

Date of hearing 23.9.2010

ORDER

Iftikhar Muhammad Chaudhry, CJ. – This appeal, by leave of the Court, has been filed against the judgment dated 19.1.2009 passed by the Lahore High Court, Lahore, whereby Crl. Appeal No.590/2009 filed by the appellant was dismissed.

2. Precisely stating relevant facts of the case as per FIR 556/2001 are that on 21.10.2001 Muhammad Arif (complainant) and Ghulam Ghous (deceased) were returning home after offering Maghrib prayer, when they reached at street No.15, suddenly Khizar Hayat (appellant) official of police department in uniform, armed with official

gun arrived there and shouted that he had come to take revenge from Ghulam Ghous for insulting him in front of his relatives and friends on account of a dispute over money. Thereafter he made straight firing at Ghulam Ghous, which hit on different parts of his body, who succumbed to the injuries at the spot. On hue and cry of the complainant, the appellant attempted to fire at him but he succeeded to run away, whereas the appellant managed to escape on his motorcycle. After completion of investigation, charge against the appellant was framed, to which he pleaded not guilty and claimed trial. The prosecution, in order to prove its case, produced as many as 14 witnesses. The appellant in his statement u/s 342 Cr.P.C. denied the prosecution story, however, he neither produced any defence evidence nor opted to record his statement on oath u/s 340(2) Cr.P.C. After considering the entire evidence on record the learned trial Court convicted the appellant u/s 302(a) PPC and sentenced him to death as Qisas. He was also directed to pay compensation of Rs.1,00,000/- to the legal heirs of the deceased. The appellant challenged his conviction/sentence before the High Court through Criminal Appeal No.590/2003 and the trial Court also forwarded Murder Reference No.467/2003 for confirmation of death sentence. The learned High Court dismissed the appeal filed by the appellant and answered the murder reference in affirmative vide impugned judgment, hence he moved jail petition before this Court, in which leave to appeal was granted by this Court. Leave granting order reads as under:-

> *"Leave to appeal is granted for reappraisal of evidence to see whether there were material contradictions in the ocular evidence and*

the medical evidence, adduced by the prosecution, and whether the petitioner could have been convicted under section 302(a)PPC instead of 302(b) PPC."

3. Learned counsel for the petitioner vehemently argued that the FIR was lodged with the delay of about two hours and the PW Ashfaq Saeed had failed to mention the time of occurrence in his statement. He further contended that no reliance could be placed on the testimony of eye witnesses who were chance witnesses; the complainant Muhammad Arif (PW-2) was the interested witness being brother of the deceased, therefore, his statement cannot be relied upon. The medical evidence was in conflict with the ocular account and the recovery of empties from the spot and the weapon of offence from the petitioner was excluded from the consideration by the High Court, therefore, the petitioner could not be punished under section 302(a) PPC.

4. Learned Additional Prosecutor General supported the impugned judgment.

5. We have examined/scrutinized the prosecution case based upon the ocular testimony furnished by Muhammad Arif, complainant (PW-2) and Ashfaq Saeed (PW-1). Former is brother of the deceased Ghulam Ghous. He got recorded his statement Ex.P.A, which was later on converted into FIR, recorded by Basharat Hussain, SI. According to his statement, on 21st October, 2001 he and his deceased brother were going to their house after offering *Maghrib* prayer at Jamiah Masjid. When they reached at street No.15, suddenly Khizar

Hayat (appellant), who is a police employee intercepted them and in a loud voice asked his brother Ghulam Ghous that "I will take revenge from you because you insulted me before my friends and relatives, on account of dispute regarding transaction of payment". He suddenly with his official gun fired at Ghulam Ghous, deceased straightly, which hit him on his head, neck and chest, who after receiving the said firearm injuries, fell down. He (complainant) made hue and cry, whereupon accused Khizar Hayat also attempted to fire at him but his life was saved as he ran away from the place. Ghulam Ghous died at the spot and the convict managed to escape good alongwith official gun on motorcycle No. 48, Honda CG 125. It is important to note that in the FIR, the complainant has also named Ashfaq Saeed (PW-1) and one Nazar Hussain (not produced), who witnessed the occurrence. He was subjected to lengthy cross examination but without extracting any beneficial statement to help the convict, however, the plea being an interested witness was raised before the trial Court, the High Court and this Court as well. We fail to understand that how a plea, which is not acceptable on the face of it, is being put forward repeatedly. The statement of the witness on account of being interested witness can only be discarded if it is proved that an interested witness has ulterior motive on account of enmity or any other consideration. Essentially this proposition has been considered in number of cases and this Court had declined to give weight to it, in absence of any reason leading to show that for some ulterior motive or on account of enmity the statement has been falsely given. There is no rule of law that

statement of interested witness cannot be taken into consideration without corroboration and even uncorroborated version can be relied upon if supported by the surrounding circumstances. In this regard reference can be made to the cases of *Khadim Hussain v. State* (2010 SCMR 1090), *Ashfaq Ahmed v. State* (2007 SCMR 641), *Shoukat Ali v. the State* (PLD 2007 SC 93) and *Muhammad Mansha v. The State* (2001 SCMR 199). This Court in the case of *Iqbal alias Bala v. The State* (1994 SCMR 1) has held that merely the friendship or relationship with the deceased will not be sufficient to discredit a witness particularly when there is no motive to falsely involve the accused. Reference can also be made to the case of *Muhammad Ehsan v. State* (2006 SCMR 1857) wherein while considering the plea raised by accused that evidence of widow of deceased could not be relied upon because she was interested witness being related to deceased, this Court held that mere fact that she was widow of deceased would not by itself sufficient to held that she was interested witness as she had no enmity with the accused and even if deceased had enmity with accused it would not have any serious effect upon the credibility and reliability of the testimony of widow. Learned High Court as well as the trial Court deeply considered this aspect of the case and declined to accept the plea.

6. The plea taken by the defence before the trial Court that deceased was a criminal type of person and he had enmity with so many persons, is unknown because the prosecution has produced trustworthy and coherent evidence through PW-Ashfaq Saeed and

PW-Muhammad Arif to support the contents of the FIR, Ex. PA/1 and to prove the cause of death, reliance was placed on the statements of Dr. Naseer Ahmad Chaudhry (PW-7), Dr. Muhammad Iftikhar Alam (PW-8) and Dr. Zainab Perveen (PW-14). Through the statement of Muhammad Arif (PW-2) the prosecution has also established the motive for causing the murder by the appellant. The happening of incident has also been established by producing site plan, recovery of blood stained earth from the place of occurrence and the empties being used in the crime weapons, however, the same were of no use because the recovery of the crime weapon has been disbelieved by the High Court. The prosecution has also established that he (appellant) is the same person, who is in employment of the police department as at the time of effecting recovery from his possession, police uniform namely, Qameez (Ex.P-8), Pant (Ex.P-9), Cap (Ex.P-10), Belt (Ex.P-11) and Boot (Ex.P-12) were recovered vide recovery memo Ex. PE, therefore, placing all the pieces of evidence in *juxta* position and evaluating the same, we are of the considered opinion that the prosecution has established the guilt against the appellant. In addition to it, it is a case of single accused, who has fired upon the deceased-Ghulam Ghous, therefore, substitution of a culprit is not possible besides it is a rare phenomenon where a witness whose close relative has been murdered would substitute the accused with an innocent person thereby allowing the actual accused to go scot-free. As far as second ocular witness of the incident Ashfaq Saeed (PW-1) is concerned, his evidence

fully corroborates to the statement of Muhammad Arif (PW-2), as it is evident from his examination-in-chief and cross examination.

7. It is contended on behalf of the convict that both the witnesses are chance witnesses, therefore, their testimony is not worthy of acceptance. It may be noticed that FIR, Ex.PA/1 was lodged with reasonable promptitude wherein names of Ashfaq Saeed (PW-1) along with Nazar Hussain (not produced) were also mentioned. The statement of Ashfaq Saeed (PW-1) was recorded on the same day after happening of incident as it is evident from his cross examination, according to which his statement was recorded by the police at the place of occurrence in between *Maghrib* and *Ishaa'* prayers. This witness has further strengthened the fact of having seen the incident by deposing that he was present in street No.12 at the time of occurrence. It is to be noted that street No.15, where the incident took place is situated within the same vicinity. In this behalf reference to the site plan Ex. P.J may be made, which has established that street No.15 is situated in front of street No.12 and the witness i.e. PW-1, who was present at a distance of 30/40 feet from the place of occurrence was capable to witness the incident. It is important to note that Ashfaq Saeed (PW-1) is an independent witness, who has no relation or enmity with the convict; inasmuch as no suggestion was given to the witness except introducing the plea as has been raised before the Court that he was a chance witness. Therefore, we have no reason to discard the evidence furnished by Ashfaq Saeed.

8. Learned counsel for the appellant emphasized that there is contradiction in the ocular testimonies furnished by Ashfaq Saeed (PW-1) and Muhammad Arif (PW-2) to substantiate the plea. We have examined the statements of Dr. Naseer Ahmad Chaudhry (PW-7), Dr. Muhammad Iftikhar Alam (PW-8) and Dr. Zainab Perveen (PW-14) viz-a viz that of PW-1 and PW-2 as well as the contents of FIR, Ex.PA/1. It is to be noted that Dr. Naseer Ahmad Chaudhry conducted autopsy and furnished postmortem report Ex.PG and pictorial diagrams Ex.PG/1 and Ex.PG/2. As far as PWs Dr. Muhammad Iftikhar Alam and Dr. Zainab Perveen are concerned, they are the members of medical board, which finally confirmed the postmortem report, Ex.PG. According to the opinion of Dr. Naseer Ahmad Chaudhry, standing medical board was on unanimous opinion that injuries 1 to 8 were ante-mortem, caused by fire arm, except injuries No.5 and 6 which were caused by blunt means. Injuries No.1,2,3 and 4 individually and in combination with rest of injuries were sufficient to cause death in an ordinary course of nature, underline cause of death being damage to the vital organs that is brain.

9. As has been pointed out hereinabove, it is a case of single accused, who fired upon the deceased. As far as identification of the convict is concerned, Dr. Naseer Ahmad Chaudhry in his statement before the trial Court has offered sufficient explanation, on the basis of which it can be held that as the head is not a stagnant part of the body and the deceased on whom firing had been made, might had been revolving his head to save the same, therefore, causing the injuries on

different parts of the head cannot be considered to hold that there is a contradiction in the ocular and medical evidence furnished by the doctors named hereinbefore.

10. There is another important aspect of the case, which is required to be seen that it is not a case of defence that injuries were not caused with firearm and some other crime weapon was used. Both the prosecution and defence are one on the point that firearm has been used, therefore, looking the case from this angle as well, one can conveniently hold that there is no contradiction in the ocular testimony of Ashfaq Saeed (PW-1) and Muhammad Arif (PW-2) and the medical evidence furnished by Dr. Naseer Ahmad Chaudhry (PW-7), Dr. Muhammad Iftikhar Alam (PW-8) and Dr. Zainab Perveen (PW-14).

11. Now it would be considered whether the learned trial Court has rightly awarded him sentence under section 302(a) PPC instead of 302(b) PPC, according to which *"whoever commits qatl-i-amd shall, subject to the provisions of this Chapter be punished with death as qisas"*. Whereas u/s 304 PPC proof of qatl-i-amd liable to qisas has to be proved in the form that if the accused makes before a Court competent to try the offence a voluntary and true confession of the commission of the offence, which is not the case of the appellant, therefore, next consideration for awarding sentence of qisas shall depend upon the evidence as provided under section 304(1)(b) PPC, which reads as under:-

> *"304. (1) Proof of qatl-i-amd liable to qisas shall be in any of the following forms, namely:-*
>
> *(a) ……..*

(b) by the evidence as provided in Article 17 of the Qanun-e-Shahadat, 1984(P.O.10 of 1984)."

12. Admittedly the convict has not made confession before the trial Court. As far as standard of evidence provided in Article 17 of Qanun-e-Shahadat, 1984 (P.O. 10 of 1984) is concerned, it depends upon the standard laid down under Islamic Law, which is that the witness must stand the test of *Tazkiya-tul-Shahood.* This very question came for consideration before a larger bench of this Court in the case of *Abdus Salam* Vs. *The State* (2000 SCMR 338). Relevant para there from is reproduced herein below:-

"In this case, the trial Court recorded conviction of the appellant under section 302(a), PPC i.e. Qatl-i-amd, punished with death as Qisas and such conviction was confirmed by the High Court. We are, however, of the view that this was a case for conviction under section 302(b) as proof in this case against the appellant was not available in either of the forms specified in section 304, P.P.C. under section 304(1), P.P.C., proof of Qatl-i-amd is required to be in one of the following forms, namely:-

(a) The accused makes before a Court competent to try the offence a voluntary and true confession of the commission of the offence; or

(b) by the evidence as provided in Article 17 of the Qanun-e-Shahadat, 1984.

Reply to the charge and his statement under section 342, Cr.P.C. by the appellant did not amount to confession as required under section 304(1)(a). Evidence of the three witnesses also did not satisfy the test provided in Article 17 of Qanun-e-Shahadat, 1984, as the said witnesses had not been subject of this Court in Manzoor v. State (1992 SCMR 2307) where it was held as follows:--

"As regards it being a case of Qatl-i-amd liable to death by Qisas the requirement of the Islamic Law is that the witnesses must stand the test of Tazkiya-tul-Shahood ( ) and the importance of it has been

emphasized in Sanaullah v.The State PLD 1991 Federal Shariat Court 186, in the following words:--

"Tazkiya-tul-Shahood ( )is obligatory in cases punishable with Hadd and Qisas, even if the competency of a witness is not challenged by the Mashood Alaih( )".

In the case of Ghulam Ali v. The State PLD 1986 SC 741 it was held that where proper Tazkiya-tul-Shahood ( )was not done of an eye-witness, the conviction under Islamic Law could not be sustained. In the present case, this requirement having not been satisfied, the conviction under injunctions of Islam could not be awarded."

We accordingly of the view that, in this matter where the prosecution had established its case against the appellant for the Qatl-i-amd of his mother, conviction was required to be recorded under section 302(b), P.P.C. and not under section 302(a), P.P.C."

In the instant case, admittedly no exercise was carried out by the learned trial Court or by the High Court to ascertain whether PWs Ashfaq Saeed and Muhammad Arif fulfill the requirement of *Tazkiya-tul-Shahood*, for which an inquiry has to be conducted and this aspect of the case has been highlighted in the case of *Ghulam Ali* v. *The State* (PLD 1986 SC 741), therefore if the prosecution had succeeded in establishing the offence of qatl-i-amd of Ghulam Ghous, there was no necessity to award the punishment of death to the convict as *qisas* u/s 302(a) PPC because the Court is empowered to award punishment of death or life imprisonment as *Ta'azir* u/s 302(b) PPC.

13. In view of the above discussion, we are of the opinion that the appellant was entitled to punishment u/s 302(b) PPC instead of 302(a) PPC, therefore, the sentence of death is maintained u/s 302(b) PPC. He

shall also be liable to pay Rs.1,00,000/- as compensation to the legal heirs of the deceased as has been observed by the trial Court vide judgment dated 2.4.2003, maintained by the High Court on 19.1.2009.

14. Consequently, the appeal is dismissed with the observations made hereinabove.

Chief Justice

Judge

Judge

Announced on 5.1.2011
at Islamabad
*Nisar/**

Approved For Reporting