

JUDGMENT SHEET
LAHORE HIGH COURT, LAHORE

Criminal Appeal No. 373-J of 2012
(Muhammad Ayyaz Vs. The State etc.)

(C.S.R NO. 35-T of 2012)

Date of hearing: 15.01.2015

Appellant by: Mr. Maqbool Ahmad Qureshi, Advocate
defence counsel at state expenses.

State by: Mr. Khurram Khan, DPG

Sadaqat Ali Khan, J.: This single judgment shall dispose of Criminal Appeal No. 373-J of 2012 filed by Muhammad Ayyaz appellant and C.S.R No.35-T of 2012 sent by the learned trial court for confirmation of the death sentence of the appellant Muhammad Ayyaz or otherwise as both the above stated matters have arisen out of the same judgment dated 25.09.2012 passed by learned Special Judge Anti-Terrorism Court No. II, Gujranwala according to which the present appellant/convict was convicted and sentenced as under:-

“(i) Muhammad Ayyaz was convicted under section 302(b) PPC and sentenced to Death as Tazir for committing Qatl-i-Amd of Muhammad Ali constable (deceased) along with compensation Rs.2,00,000/- payable to the legal heirs of the deceased and in default thereof further undergo SI for six months.

He was also convicted under section 7 (a) of ATA 1997 and sentenced to death for causing Qatl-i-Amd of Muhammad Ali constable (deceased) along-with fine Rs.2,00,000/- and in default thereof further undergo six months S.I

Whereas his co-accused namely Muhammad Ilyas and Mst. Shaheen Akhtar were acquitted by the learned trial court in case FIR No. 625 dated 30.06.2011 under sections 302/353/186/34, 109 PPC read with section 7 ATA of 1997 police station, City Hafizabad.

2. The facts of the case have been stated by Javaid Akhtar SI/complainant PW-9 in his statement before the learned trial court and same statement is hereby reproduced for narration of the facts: -

“On 29.06.2011, I alongwith Muhammad Ilyas ASI, Muhammad Ali 3675/C, Muhammad Arshad 1663/C, Muhammad Ashraf 686/C, Muhammad Ashraf 1207/C, Muneeb Ahmad 3276/C, Basharat

Ali 4012/C on official vehicle bearing No.GAL/ 1051 being driven by Muhammad Ishaq 804/C in connection with conducting raid to arrest Muhammad Ayaz son of Muhammad Ilyas accused present in the Court visited police station City Hafizabad, a P.O. of case FIR No.237/11, dated 01.04.2011, U/S 336/337-L(ii)/337-A(i)/148/149 PPC P.S. Noshara Virkan. We conducted raid alongwith Muhammad Akram 73/C from P.S. City Hafizabad, at 12:30 a.m. (night) on 30.06.2011, in Mohallah Bahawalpura, knocked at the door, the accused Muhammad Ayaz, Muhammad Ilyas and Mst. Shaheen Akhtar present in the Court came out by switching on the outer light. I asked Muhammad Ilyas accused to get court arrest your son Muhammad Ayaz accused being a P.O whereby Muhammad Ilyas accused became infuriated who asked his son Muhammad Ayaz to fire upon the police as they tease them on daily basis and also asked Mst. Shaheen accused to go inside. Muhammad Ayaz accused fired at Muhammad Ali/C with his 30 bore pistol hitting on his chest who fell down. We took Muhammad Ali constable to hospital but he succumbed to the injury in the way to the hospital. The accused fled away by scaling over the roofs of the houses.

3. *After registration of the case, investigation started and on completion of the same report under section 173 Cr.P.C was submitted in the trial court.*

4. *Learned trial court after observing legal formalities provided under the Criminal Procedure Code framed the charge on 12.11.2011 against the present appellant/convict under sections 186/34, 353, 109, 302 PPC read with section 7 (a) of ATA 1997 to which he pleaded not guilty and prosecution evidence was summoned.*

5. *Prosecution produced Muhammad Ansar as PW-1, Asghar Zaman ASI PW-2, Yasir Shaukat PW-3, Dr. Ahsan Ahmad PW-4, Ihsan Elahi PW-5, Mukhtar Ahmad PW-6, Masood Ahmad Bhatti Draftsman PW-7, Amir Sohail PW-8, Javed Akhtar SI PW-9, Muhammad Ilyas ASI PW-10, Tanveer Abbas SI PW-11 whereas PWs namely Faheem Abbas constable, Sajjad Ahmad constable, Amanat Ali constable, Arshad constable and Basharat Ali were given up by the prosecution being unnecessary and tendered in evidence last worn clothes of the deceased Ex.PA, application to SHO Ex.PB, FIR Ex.PB/1, postmortem examination report Ex.PC, recovery memo of pistol 30 bore Ex.PE, site plan Ex.PEE/1, recovery memo of blood stained earth Ex.PF, recovery memo of empty bullets Ex.PG, injury statement*

Ex.PH, death report ExPJ, Copy of application for Postmortem Ex.PK, site plan Ex.PL, application for medical examination Ex.PM, news clippings Mark-A to Mark-G and closed the prosecution evidence.

6. *Medical evidence was furnished by Dr. Ahsan Ahmad PW-4 who stated that 30.06.2011 at 10:00 a.m, he conducted the postmortem examination on the dead body of Muhammad Ali constable deceased detail of which is as under: -*

“EXTERNAL EXAMINATION.

A dead body of young male, wearing police uniform with police shoulder, colour (black shirt, white vest and khaki pent), blood-stained and corresponding hole of firearm present, signed and handed over to police. Rigor mortis and postmortem staining was at developing stage, uniform consisted of black shoes, underwear, belt No. of 3675/GRW, flag also handed over to police. Eyes closed, mouth semi opened.

EXTERNAL INJURIES.

- 1. Lacerated firearm wound of entry 1 cm x 1 cm, going deep on the lower part of left chest, 3 cm from midline towards left, 7 cm from left nipple towards midline and 5 cm from epigastrium towards wound, margins were inverted corresponding with wound of exit on the back of chest, size 1.5 cm x 1 cm margins everted 10 cm from mid axillary line, entry and exit wound at the same level (Horizontal).*

ON DISSECTION.

Pericardium, left lung, heart, main blood vessel smashed and injured, left chest cavity full of blood.

CRANIUM & SPINAL CORD.

Scalp, skull, membranes, brain, vertebrae and spinal cord, all intact and healthy.

THORAX.

Walls injured, left pleurae injured, left lung injured, pericardium and heart injured, blood vessels injured, larynx and trachea intact healthy, right lung intact healthy.

ABDOMEN.

Walls, peritoneum, mouth, pharynx, esophagus, diaphragm, stomach and its contents, pancreas, small intestines and its contents, large intestines and its contents, liver, spleen, kidneys right and left, urinary bladder, organs of generation, all healthy and intact.

UPPER AND LOWER LIMBS.

Upper lower limbs intact and healthy.

FINAL OPINION.

Death in my opinion was due to haemorrhage and shock, as a result of injury No.1 which is sufficient to cause death in ordinary course of nature. Injuries were ante-mortem and result of firearm weapons”

7. *On the other hand, statement of present appellant Muhammad Ayyaz was recorded under section 342*

Cr.P.C who refuted the allegations so leveled against him and has not opted to appear as a witness under section 340(2) Cr.P.C and also did not produce oral defence, and however in documentary evidence produced documents i.e. Ex.DA to Ex.DV and in reply to question “why this case against you and why the PWs deposed against you?” the appellant Muhammad Ayyaz replied as under:-

“I adopted the statement of my sister Mst. Shaheen Akhtar and add that Noshehra Virkan police had no valid ground or material in the shape of warrant of arrest or proceedings U/S 87/88 Cr.PC. as the original case i.e. FIR No.237/11 mentioned above was false and baseless and had no legs to stand coupled with the fact that they had not obtained any warrant of arrest or proclamation and so the launching of the raid by Javed Akhtar S.I. was an illegal act.

As there had been a deal between Muhammad Asif and the police from Noshera Virkan and subsequently with the police of P.S. City Hafizabad so they were working as equal partner in the crime. It is also apparent from the record of the case that there was absolutely no senior police officer to check, oversee and supervise the glaring lapses in the investigation of the instant case. It appears that police of Noshera Virkan were complacent that there would be no resistance and they would accomplished their mission smoothly but then an overzealous young blood Muhammad Ali constable changed the entire situation since morality and law was on our side so no one from the thickly populated Mohallah did support the tyrant i.e. Muhammad Asif and the police. I may submit that Javed Akhtar S.I. with his party of 08 strong policemen including Muhammad Ali constable, all armed with automatic firearms launched a clandestine raid on my sister’s house in pitch-dark at the dead of night without any legal authority i.e. warrant of arrest or the proclamation or search warrant. The prosecution has failed to produce any record to justify their action before the law or morality. I fully support the act of my sister Mst. Shaheen Akhtar who acted in self-defense and tried to repel the trespasser.

As regards the question why the PWs deposed against us, I would submit that no God fearing person from the locality supported the outrageous act of the police which speaks volume against them and so the only two eye witnesses at the trial were the complainant Javed Akhtar SI and his subordinate Muhammad Ilyas ASI who could easily be labeled as accused”

8. *After conclusion of the trial, learned trial court convicted the present appellant Muhammad Ayyaz with above stated sentences through judgment dated 25.09.2012. Hence this appeal.*

9. *Learned counsel for the appellant contended that:-*

- (i) *the judgment of the trial court dated 25.09.2012 is against law and facts on the file and is liable to be set-aside.*
- (ii) *that the prosecution has failed to prove its case against the present appellant as there are many major discrepancies in the statements of the PWs and the learned trial court has convicted the appellant on the basis of surmises and conjectures;*
- (iii) *it is contended that the impugned judgment of the trial court is not maintainable in the eyes of law;*
- (iv) *lastly submitted that appeal may be accepted and the judgement of the trial court dated 25.09.2012 may kindly be set aside and appellant may be acquitted.*

10. *On the other hand, learned DPG has vehemently opposed the appeal and submitted that: -*

- (i) *prosecution has proved its case beyond any shadow of doubt against the appellant with solid evidence and prayed for the dismissal of the present appeal.*

11. *We have heard the learned counsel for the parties and perused the record.*

12. *The detail of prosecution case as given by Javed Akhtar SI complainant PW-9 has already been given in paragraph No. 2 of this judgment, therefore, there is no need to repeat the same.*

13. *Place of occurrence is a street of the house of present appellant. Time of occurrence is 12:30 a.m. (night) on 30.06.2011. Javed Akhtar SI PW-9 and Muhammad Ilyas ASI PW-10 claim themselves to be the eye witnesses of the occurrence and stated that on 30.06.2011 at about 12:30 a.m. (night) they in order to arrest Muhammad Ayyaz the then proclaimed offender of case FIR No.237 dated 01.04.2011 under sections 336/337-L(ii)/337-F(i)/337-A(i)/148/149 PPC Police Station Naushera Virkan, District Gujranwala reached at the door of the house of the present appellant and knocked at the door. From the house Muhammad*

Ayyaz present appellant, Muhammad Ilyas and Mst. Shaheen Akhtar (acquitted accused) came out by switching on the outer light. Muhammad Ilyas (acquitted accused) asked present appellant to fire upon Police. Muhammad Ayyaz present appellant made fire at Muhammad Ali constable deceased with his 30 bore pistol which hit on his chest, he fell down after receiving firearm injury and succumbed to the injuries in the way to the Hospital. Both these witnesses alongwith Muhammad Ali, Constable deceased went to arrest Muhammad Ayyaz present appellant at his house the then was proclaimed offender in case FIR No.237/2011 stated above. Hence the presence of these two PWs at the place of occurrence at the time of occurrence cannot be considered as un-natural or improbable. Both these witnesses were cross examined at length, their evidence could not be shaken during the process of cross examination. They corroborated each other on all material aspects of the case. The story narrated by these PWs is quite natural, they had no grudge or ill will to falsely implicate present appellant in this case. The evidence of both these witnesses is straightforward, trustworthy and confidence inspiring.

14. *Medical evidence was furnished by Dr. Ahsan Ahmad PW-4 who conducted postmortem examination on the dead body of Muhammad Ali deceased on 30.06.2011 at 10:00 a.m. and observed following injury:-*

“Lacerated firearm wound of entry 1 cm x 1 cm, going deep on the lower part of left chest, 3 cm from midline towards left, 7 cm from left nipple towards midline and 5 cm from epigastrium towards wound, margins were inverted corresponding with wound of exit on the back of chest, size 1.5 cm x 1 cm margins everted 10 cm from mid axillary line, entry and exit wound at the same level (Horizontal).”

15. *He further stated that death in his opinion was due to hemorrhage and shock as a result of above stated injury which was sufficient to cause death in ordinary course of nature. Injury was antemortem as a result of firearm weapon. Probable time that elapsed between death and postmortem was 8 to 16 hours which is in line with the time of occurrence i.e. 12:30*

a.m.(night) on 30.06.2011. It is concluded that medical evidence has fully supported the ocular account furnished by above stated two eye witnesses.

16. *Tanveer Abbas SI PW-11 I.O of this case stated that on 30.06.2011 during spot inspection he recovered crime empties from the place of occurrence which were taken into possession through recovery memo Exh.PG attested by Muhammad Ilyas PW-10. Muhammad Ilyas ASI PW-10 stated that on 30.06.2011 he joined the investigation of this case with Tanveer Abbas SI PW-11 I.O of this case and during spot inspection in his presence I.O recovered crime empty P-12 from the place of occurrence which was taken into possession through recovery memo Exh.PG attested by him. Both these PWs have not stated in their statements before the trial court that parcel of crime empty P-12 had been prepared at the spot after its recovery. Tanveer Abbas SI PW-11 I.O of this case further stated that present appellant was arrested on 01.07.2011 and on 08.07.2011 during interrogation he disclosed and led to the recovery of 30 bore pistol P-11 from his house which was taken into possession through recovery memo Exh.PE attested by Amir Sohail PW-8. This witness Tanveer Abbas SI PW-11 I.O of this case has not stated that parcel of 30 bore pistol P-11 had been prepared at the spot after its recovery. Prosecution is silent that when parcels of crime empty P-12 and 30 bore pistol P-11 were prepared. Considering statements of Tanveer Abbas SI PW-11 I.O of this case and Muhammad Ilyas ASI PW-10 to the extent of recoveries of crime empty P-12 and 30 bore pistol P-11 stated above admittedly parcels of crime empty P-12 and 30 bore Pistol P11 were not prepared at the time of their recovery which makes the recovery doubtful. In view of the above possibility cannot be ruled out of consideration that crime empty P-12 had been sent to FSL after manufacturing the same to procure positive report of FSL Exh.PQ which is not believable and same is hereby discarded.*

17. *Although we have discarded positive report of FSL Exh.PQ regarding matching of 30 bore pistol P-11 with crime empty P12 but if evidence of recovery of 30 bore pistol P-11 is excluded from consideration even then prosecution has proved its case beyond shadow of doubt against the present appellant through ocular account furnished by above stated eye witnesses supported by medical evidence as discussed earlier.*

18. *Adverting to the defence plea of the present appellant Muhammad Ayaz he stated in answer to question “why this case against you and why the PWs deposed against you?” as under:-*

“I adopted the statement of my sister Mst. Shaheen Akhtar and add that Noshehra Virkan police had no valid ground or material in the shape of warrant of arrest or proceedings U/S 87/88 Cr.PC. as the original case i.e. FIR No.237/11 mentioned above was false and baseless and had no legs to stand coupled with the fact that they had not obtained any warrant of arrest or proclamation and so the launching of the raid by Javed Akhtar S.I. was an illegal act. As there had been a deal between Muhammad Asif and the police from Noshehra Virkan and subsequently with the police of P.S. City Hafizabad so they were working as equal partner in the crime. It is also apparent from the record of the case that there was absolutely no senior police officer to check, oversee and supervise the glaring lapses in the investigation of the instant case. It appears that police of Noshehra Virkan were complacent that there would be no resistance and they would accomplished their mission smoothly but then an overzealous young blood Muhammad Ali constable changed the entire situation since morality and law was on our side so no one from the thickly populated Mohallah did support the tyrant i.e. Muhammad Asif and the police. I may submit that Javed Akhtar S.I. with his party of 08 strong policemen including Muhammad Ali constable, all armed with automatic firearms launched a clandestine raid on my sister’s house in pitch-dark at the dead of night without any legal authority i.e. warrant of arrest or the proclamation or search warrant. The prosecution has failed to produce any record to justify their action before the law or morality. I fully support the act of my sister Mst. Shaheen Akhtar who acted in self-defense and tried to repel the trespasser.

As regards the question why the PWs deposed against us, I would submit that no God fearing person from the locality supported the outrageous act of the police which speaks volume against them and so the only two eye witnesses at the trial were the complainant Javed Akhtar SI and his

subordinate Muhammad Ilyas ASI who could easily be labeled as accused”

He has also tendered the documents Ex.DA to Ex.DV but he did not appear as a witness under section 340(2) of Cr.PC. and also did not produce any oral defence evidence. Considering above it is concluded that appellant has failed to prove his defence plea and learned trial court has rightly discarded his defence plea with sufficient reasons.

19. *Adverting to the quantum of sentence of the present appellant we have noted some mitigating circumstances in this case:-*

- i. We have discarded positive report of FSL Exh.PQ regarding matching of 30 bore Pistol P-11 with crime empty P12 and recovery of pistol P11 has become inconsequential in this case.*
- ii. Javed Akhtar SI PW-9 (eye witness) stated in FIR Exh.PB/1 that present appellant was proclaimed offender in case FIR No.237/2011 but stated in cross examination that he did not investigate case FIR No.237/2011 and prosecution has not produced such FIR showing that present appellant was accused in that case. Further prosecution has also not produced any non bailable warrants of arrest, proclamation or order of the court in which present appellant had been declared as proclaimed offender. No other reason has been disclosed by the prosecution to raid the house of the present appellant. It is not determinable in this case as to what had actually happened before the occurrence.*
- iii. It is a case of single fire shot and there is no allegation of repetition of any firearm injury against present appellant.*

20. *Reliance is placed on case “Subedar (Retd.) Abdul Majeed and others v. Mulazim Hussain Shah and*

another” (2010 SCMR 641), on case “Muhammad Javed and another v. The State and others” (2011 SCMR 1462) and on case “Latif Ullah v. The State” (2007 SCMR 994). Considering the peculiar facts of this case we are of the view that death sentence awarded to the present appellant is quite harsh.

21. *It is well-organized principle by now that accused is entitled to the benefit of doubt as an extenuating circumstance while deciding his question of sentence, as well. In this regard we respectfully refer the case of ‘Mir Muhammad alias Miro v. The State’ (2009 SCMR 1188) wherein Hon’ble Supreme Court has held as under:-*

“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 decision restrict the life and liberties of the people. Indeed the accused persons are also entitled to extenuating benefit of doubt to the extent of quantum of sentence”

22. *It is settled by now that if court entertains some doubt not sufficient for acquittal, judicial caution must be exercised to award the alternative sentence of life imprisonment. Reliance is placed on case “Ghulam Mohy-ud-Din alias Haji Babu and others v. The State” (2014 SCMR 1034) in which august Supreme Court of Pakistan has observed at page 1043 as under:-*

“A single mitigating circumstance, available in a particular case, would be sufficient to put on guard the Judge not to award the penalty of death but life imprisonment. No clear guideline, in this regard can be laid down because facts and circumstances of one case differ from the other, however, it becomes the essential obligation of the Judge in awarding one or the other sentence to apply his judicial mind with a deep thought to the facts of a particular case. If the Judge/Judges entertain some doubt, albeit not sufficient for acquittal, judicial caution must be exercised to award the alternative sentence of life imprisonment, lest an innocent person might not be sent to the gallows. So it is better to respect the human life, as far as possible, rather to put it at end, by assessing the evidence, facts and circumstances of a particular murder case, under which it was committed.”

23. *For the foregoing reasons, the conviction of the present appellant under section 302(b) PPC and under section 7(a) of ATA 1997 is maintained but his sentence*

is altered from death to life imprisonment. Compensation and fine awarded by the learned trial court and sentences in default thereof are also maintained. All these sentences shall run concurrently. The benefit of section 382-B Cr.PC. is also given to the appellant. Consequently, with the above said modification in the sentences of Muhammad Ayaz present appellant Crl. Appeal No.373-J of 2012 is hereby dismissed. CSR No.35-T of 2012 is answered in **NEGATIVE** and death sentence of Muhammad Ayaz present appellant is **NOT CONFIRMED.**

(Abdul Sami Khan)
Judge

(Sadaqat Ali Khan)
Judge

M. Afzal*

Judgment Approved
for Reporting.