

2011 M L D 1636

[Quetta]

Before Muhammad Hashim Khan Kakar and Ghulam Mustafa Mengal, JJ

ABDUL HADI---Appellant

Versus

THE STATE---Respondent

Criminal Appeal No.(S) 35 of 2009, decided on 28th July, 2011.

(a) Penal Code (XLV of 1860)---

----Ss. 302(6) & 34---Qatl-e-amd---Appreciation of evidence---Common intention---Statements of two eye-witnesses who were not only independent, but were also residents of the same village, where the incident had taken place were not discrepant---Names of witnesses had been duly mentioned in the F.I.R.---Some dispute existed between the parties over the land---Accused person and deceased were close relatives and due to civil dispute, the things were simmering within the family circle, when it came to a climax as on the day of occurrence---Both the witnesses appeared to be totally disinterested witnesses and nothing smacked of any partisanship in them---F.I.R. recorded on the statement of deceased, who while in injured condition, had given the details of incident, assigning specific roles to accused person before the Police Officer in the Hospital, could be treated as dying declaration, which was fully corroborated by the other pieces of evidence---Dying declaration though was not a substantive piece of evidence, but could be used as a corroborative piece of evidence in support of ocular account furnished by the witnesses-Accused though had not caused injury to the deceased, but he brought his companion equipped with a pistol at the

venue of the offence and yelled the deceased that he would not be spared---Subsequent to the incident, accused took away his companion, who was involved in the murder of the deceased---Conduct of accused was not less than complete involvement attracting S.34 of P.P.C.-Having come together and having gone together, had left no room for doubt about the common intention of all to cause the murder of deceased---Question as to who made the firing, in such a situation, would become insignificant---Once it was proved that injuries caused by any one of them, was sufficient in the ordinary course of nature to cause death; that was enough to bring the case of such accused within the ambit of S.34, P.P.C.---Accused was rightly convicted under S.302, P.P.C. read with S.34, P.P.C.

(b) Penal Code (XLV of 1860)---

---Ss. 34 & 302---Qatl-e-amd---Common intention---Existence or formation of common intention within the meaning of S.34, P.P.C., was not generally susceptible of direct proof and had to be inferred from the act of accused, his conduct or other relevant circumstances of the case---Common intention could be inferred from the entire conduct of accused and not from an individual act, which he committed on the spot.

Muhammad Aslam Chishti for Appellant.

Kamal Khan Kakar for the State.

Muhammad Sadiq Ghulam for the Complainant.

Date of hearing: 30th June, 2011.

JUDGMENT

MUHAMMAD HASHIM KHAN KAKAR, J.---This appeal is directed against the judgment dated 2nd April, 2009, passed by the Additional Sessions Judge-I, Sibi, whereby appellant Abdul Hadi was convicted and sentenced under section 302(b) of the P.P.C. to suffer life imprisonment as Ta'zir and fine of Rs.50,000, in default thereof to further undergo' S.I. for six months, with benefit of section, 382-B Cr.P.C.

2. The relevant facts, arising out of the instant appeal, are that on the Fard-e-Bayan (Exh.P/10-A) of complainant/deceased Muhammad Yaqoob dated 17th February, 2007, a case vide Crime No.4 of 2007, under section 324 read with section 34 of the P.P.C., was registered at Police Station, Dhadhar District Bolan against the appellant and absconding accused persons. It was alleged by the complainant that on above date, at about 6-30 p.m., he came out of his house and started conversation with Haji Taj Muhammad and Abdul Karim, standing in the street. In the meanwhile, his cousins Abdul Hadi, Muhammad Hussain, Muhammad Arif and Muhammad Hanif came there. Accused Abdul Hadi was having danda in his hand, whereas Muhammad Hussain was holding a pistol in his hand and the remaining were empty handed. Accused Abdul Hadi told that today they will not leave him alive and accused Muhammad Hussain made firing upon him with pistol, due to which, he sustained bullet injuries on his belly, right arm and left armpit and fell down. Upon hearing fire reports, his brother-law, namely, Muhammad Aslam reached at the spot and he was shifted to Civil Hospital, Sibi, wherefrom he was taken to Civil Hospital, Dhadhar. The motive behind the incident was property dispute between the parties. Subsequently, injured Muhammad Yaqoob succumbed to the injuries at BMC Hospital, Quetta and section 302 of the P.P.C. was incorporated the F.I.R.

3. After registration of the F.I.R. Exh.P/8-A on the basis of Fard-e-Bayan of injured deceased Exh.P/10-A, investigation of the case was carried out by P.W.8 Muhammad Sadiq, A.S.-I. He visited the place of occurrence along with S.H.O. Raja Basharat and other police officials, prepared site inspection memo. Exh.P/8-B, secured blood-stained earth, collected two empties of TT pistol and blood-stained clothes of injured vide memos, recorded the statements of P.Ws., arrested the accused Abdul Hadi on 18th February, 2007 from Goth Landi Khosa. On 20th February, 2007, he received information regarding death of injured Muhammad Yaqoob and on 22nd February, 2007, the investigation was transferred to Nasir Hussain, A.S.-I., who obtained medical certificate of injured deceased, obtained non-bailable warrants of arrest of absconding accused on 2nd March, 2007 and on the same day, recovered crime weapon from, the accused, recorded the statements of P.Ws. He placed the papers before S.H.O. Raja Basharat, who prepared incomplete challan Ex.P/9-A. After receiving FSL report Exh.P/9-B and death certificate, supplementary challan Exh.P/9-B was prepared.

4. On the stated allegations, a formal charge was framed and read over to the accused, to

which he did not plead guilty and claimed trial. The prosecution, in order to prove the accusation, produced 10 witnesses. P.W. is Muhammad Aslam, who soon after the incident reached at the spot, saw his brother-in-law in injured condition and fleeing away the accused persons from the crime scene. He is also witness of the shifting of deceased injured to hospital and recording report about the incident to the police. P.W.2 is Abdul Khaliq, who also reached at the spot soon after the occurrence and saw Muhammad Yaqoob in injured condition. He is also witness of the shifting of injured to hospital, handing over of blood-stained clothes of injured to the investigating officer, inspection of the site by the investigating officer, securing of blood-stained earth, empties etc. from the place of occurrence. P.W.3 Muhammad Ameen, constable, is witness to the recovery of crime weapon i.e. danda on the pointation of accused from Goth Landi. P.W.4 Dr. Lal Muhammad, Medical Superintendent, DHQ Hospital, Dhadhar, examined the injured and issued medico legal certificate Exh.P/4-A. P.W.5 Abdul Karim and P.W.6. Taj Muhammad are stated to have witnessed the occurrence. P.W.7. Dr. Syed Baqir Shah, MLO, BMC Hospital, Quetta issued death certificate Exh.P/7-A on the basis of examination of dead-body of deceased by Dr. Malik Safdar Hussain. P.W.8 Muhammad Sadiq A.S.-I. and PW-9 Nasir Hussain, S.-I., are the investigating officers, whereas P.W.10 Raja Basharat Ali recorded the Fard-e-Bayan of injured Muhammad Yaqoob and challaning officer.

5. Thereafter, the appellant was examined under section 342 Cr.P.C., wherein he denied the prosecution allegations and claimed to be innocent. He recorded his statement on oath as provided under section 340(2), Cr.P.C. and also produced one Muhammad Ameen in defence." The trial Court, after close of the parties evidence, vide impugned judgment, convicted and sentenced the appellant, as mentioned hereinabove, hence, this appeal.

6. Mr. Muhammad Aslam Chishti, learned counsel for the appellant, contended that there is no evidence available on record, which could connect him with the commission of offence. He stressed that according to medical evidence, the deceased had received firearm injuries and according to the prosecution story, such firing was made by absconding accused. There is no evidence of sustaining injuries with danda by the deceased, thus, the recovery of crime weapon i.e. danda, allegedly, effected on the disclosure and pointation of appellant is of no legal consequence. He further contended that the trial Court, without proper application of mind and without considering the material in its true perspective, has drawn conclusions contrary to record, therefore, appellant deserves acquittal.

7. On the other hand, Mr. Muhammad Sadiq Ghumman, learned counsel for the complainant and Mr. Kamal Khan Kakar, Advocate, representing the State, vehemently opposed the contentions raised by the learned counsel for the appellant and supported the judgment impugned herein. They contended that the prosecution has successfully proved its charge against the appellant beyond any reasonable doubt.

8. We have considered the arguments of learned counsel for the parties and have gone through the evidence available on record as well as impugned judgment.

As far the death of deceased Muhammad Yaqoob, apart from the oral testimony, there is evidence of P.Ws. Dr. Lal Muhammad and Dr. Syed Baqir Shah, who had examined the deceased and issued the medico legal certificate and death certificate. The external examination revealed that two bullet entrance wounds on the right iliac region and bullet entrance wound on the front abdomen of the deceased. According to P.W. Dr. Syed Baqir Shah, injured Muhammad Yaqoob died on 19th February, 2007 in Surgical Unit-IV, Bolan Medical Complex Hospital, Quetta. Even otherwise, the defence has not disputed the unnatural death of deceased on account of firearm injuries.

9. There are two eye-witnesses of the occurrence i.e. P.Ws. Abdul Karim and Taj Muhammad. They are not only independent witnesses, but also residents of the same village, where the incident had taken place. There are no discrepancies in their statements worth the name.

The incident had taken place at about 6-30 p.m. and the report was lodged on the statement of injured Muhammad Yaqoob subsequently died) at 10-45 p.m., in which the names of these witnesses had been duly mentioned. The fact that there had been some dispute over the land between the parties is also admitted feature of the case. The accused persons and deceased are close relatives, so, due to civil dispute, the things were simmering within the family circle when it came to a climax on the day in question. Both the witnesses appear to be totally disinterested witnesses and nothing smacks of any partisanship in them. That will be a confirmatory circumstance in support of the ocular testimony.

10. Besides, the ocular account, furnished by P.Ws. 5 and 6, the prosecution case also rests on the F.I.R. Exh.P/8-A, recorded on the statement of deceased Muhammad Yaqoob, who, in injured condition, had given the details of the incident, assigning specific roles to the accused persons before the police officer in the hospital, when he, according to the witnesses, was conscious and able to speak. Thus, in the given circumstances, said F.I.R. could be treated as dying declaration, which was fully corroborated by the other pieces of evidence. We are mindful of the fact that dying declaration is not a substantive piece of evidence, but can be used as a corroborative piece of evidence in support of ocular account furnished by the witnesses, because a great sanctity is attached to it, as a dying man is normally not likely to implicate innocent persons falsely.

11. Mr. Muhammad Aslam Chishti, learned counsel for the appellant, has contended that the firing was an individual act of the absconding accused Muhammad Hussain. It was sudden affair and, therefore, the appellant Abdul Hadi had no common intention to kill the deceased. According to the learned counsel that the only allegation against appellant is that he yelled to deceased Yaqoob that today he would not be spared. Further contended that there was no pre-concert, as such, the appellant could not be convicted under section 302 read with section 34 of the PPC. The contentions of the learned counsel have not impressed us. We are of the opinion that the existence or formation of a common intention within the meaning of section 34 of the P.P.C. is not generally susceptible of direct proof and has to be inferred from the act of the accused; his conduct or other relevant circumstances of the case. It can be inferred from the entire conduct of accused and not from an individual act, which he committed on the spot. Appellant, though, not caused injury to the deceased, but he brought his companion Muhammad Hussain, equipped with a pistol at the venue of the offence and yelled deceased that he would not be spared. Subsequent to the incident taking away his companion, who was involved in the murder of the deceased. The conduct of the appellant is not less than complete involvement attracting section 34 of the P.P.C., having come together and having gone together, clearly leaves no room for doubt about the common intention of all to cause the murder of deceased Muhammad Yaqoob. In such a situation, the question as to who made the firing, becomes insignificant and 'once it is proved that injuries caused by any one of them was sufficient in the ordinary course of nature to cause death, that is enough to bring the case of such accused within the ambit of Section 34 of the PPC. It will be noticed that appellant Abdul Hadi was armed with a danda and absconding accused Muhammad Hussain was armed with a pistol. Both of them, along with their companions, came with the intention to commit the murder of deceased. In these circumstances, he shared the common intention of his companion Muhammad Hussain, who killed the deceased and was rightly convicted under section 302 read with section 34 of the P.P.C.

Thus, the appeal, being without merit, is dismissed.

H.B.T./70/Q

Appeal dismissed.