Stereo HCJDA-38

Judgment Sheet

IN THE LAHORE HIGH COURT
MULTAN BENCH, MULTAN
JUDICIAL DEPARTMENT

Crl. Appeal No.862 of 2011
(Mst. Amena Gulnaz alias Aimena versus The State)

JUDGMENT

Date of hearing	26.01.2016
Mst. Amena Gulnaz alias Amena (appellant) by	Mr. Muhammad Usman Sharif Khosa, Advocate along with appellant
State by	Mr. Sarfraz Ahmad Khan Khichi, Deputy District Public Prosecutor
Ghulam Yaseen (complainant) by	Nemo

Shehram Sarwar Ch. J:- Mst. Amena Gulnaz alias Aimena (appellant) alongwith her co-accused namely Allah Ditta and Ijaz Hussain was tried by the learned Sessions Judge, Dera Ghazi Khan in case FIR No.966 dated 01.12.2010, offences under Sections 302 and 34 PPC, registered at Police Station Saddar District Dera Ghazi Khan for the murder of Abu Bakar (deceased), paternal nephew (*bhatija*) of the complainant. Vide judgment dated 14.09.2011 passed by the learned Sessions Judge, Dera Ghazi Khan, Mst. Amena Gulnaz alias Aimena (appellant) has been convicted under Section 302(c) PPC and sentenced to fourteen years simple imprisonment, with a further direction to pay Rs.1,00,000/- (rupees one lakh only) as compensation under Section 544-A, Code of Criminal Procedure to the legal heirs of the deceased and in default whereof to further undergo six months S.I. Benefit of Section 382-B, Cr.P.C. was extended to the appellant. However, through the same judgment co-accused of the appellant namely Allah Ditta and Ijaz Hussain have been acquitted of the charge by extending them benefit of doubt and no appeal against their acquittal was filed either by the State or by the complainant. Assailing

the above conviction and sentence, Mst. Amena Gulnaz alias Aimena (appellant) has filed the appeal in hand.

2. Precisely, facts of the case, as contained in the FIR (Ex.PC/1) registered on the statement (Ex.PC) of Ghulam Yaseen, complainant (PW.5) are that he was a labourer. His brother Muhammad Shafi, who was resident of Mehtar Colony, Dera Ghazi Khan, had to go to Saudi Arabia on 02.12.2010 and the complainant alongwith his brother Fayyaz Ahmad and son-in-law Muhammad Bilal son of Ghulam Rasool were present in his house. On the day of occurrence i.e. 01.12.2010 at *Asar* wela, Muhammad Abu Bakar and Muhammad Bilal went from the house to purchase grocery and when they reached near wooden toll of Allah Ditta Patafi near Union Council Manka Road, Allah Ditta son of Ghulam Qadir, armed with sota intercepted them. He called his son Ijaz and daughter Amena Mai from the nearby house and raised *lalkara* to teach a lesson to Abu Bakar for insulting him. Meanwhile, the complainant and Fayyaz Ahmad reached at the spot and within their view, Mst. Amena Mai armed with pistol and her brother Ijaz emerged from the nearby quarter. Amena made straight firing at Abu Bakar, who fell down after sustaining firearm injuries. When the complainant party tried to apprehend Mst. Amena Mai in order to stop the firing, Ijaz after taking pistol from Amena Mai pointed the same on the complainant's side and made fire which hit Abu Bakar. The complainant party got frightened and the accused considering Muhammad Abu Bakar as dead fled away alongwith pistol. The complainant party attended Muhammad Abu Bakar who was lying in injured condition, besmeared with blood. He was shifted to DHQ Hospital on the vehicle of rescue 1122.

Motive behind the occurrence as alleged in the FIR was a domestic dispute of Abu Bakar with Allah Ditta and his family members and in the morning of day of occurrence, hot words were exchanged between Allah Ditta and Muhammad Abu Bakar. It was alleged that due to that grudge, Allah Ditta, his son Ijaz and daughter

Amena, in consultation with each other, launched a murderous assault on Muhammad Abu Bakar and caused him injuries.

3. Initially the case was registered under Section 324 and 34 PPC and on the death of Abu Bakar (deceased), Section 302 PPC was added. After completion of investigation, report under Section 173, Code of Criminal Procedure was submitted before the learned trial court. The appellant and his co-accused namely Allah Ditta and Ijaz Hussain were summoned by the learned trial court to face the trial and after fulfillment of codal formalities, they were charged sheeted under Section 302 read with Section 34 PPC on 30.04.2011. After closeure of prosecution evidence, statements of the appellant and his co-accused under Section 342, Code of Criminal Procedure were recorded on 10.09.2011, wherein they refuted all the allegations of the prosecution. In answer to a question as to why the case against her and why the prosecution witnesses had deposed against her, Mst. Amena Gulnaz alias Aimena (appellant) replied as under:-

> "On the day of occurrence, I was present in the house of my father. My brother Ijaz and his wife Kundan Mai reside with my father. Abu Bakar is the nephew of Kundan who used to visit Kundan Mai. On the day of occurrence I was alone in the house of my father when Abu Bakar came to deliver clothes to his Aunt Kundan Mai. I told him that Kundan Mai was not present in the house and I was alone in the house. Upon hearing this he gave me the clothes of his Aunt and left the house. After a short while Abu Bakar decease came back armed with pistol. He threatened me to keep silent otherwise he would kill me. Then he committed Zina with me on pistol point without my consent. I could not resist due to fear of my life. He committed Zina with me on a mattress lying on the floor. After committing Zina he put down the pistol for wearing his shalwar. When he had worn shalwar, I lifted the pistol and fearing for my life and in extreme

> anger because of being raped made fire shots at Abu Bakar. This false case was registered against me, my father and my brother Ijaz in order to cover up this gruesome act of Abu Bakar deceased."

The appellant neither opted to appear as her own witness as provided under Section 340(2) Code of Criminal Procedure nor she produced any evidence in her defence. However, after conclusion of the trial, the learned trial court convicted and sentenced the appellant as detailed above whereas her co-accused namely Allah Ditta and Ijaz Hussain have been acquitted of the charge. Hence this appeal.

4. Learned counsel for the appellant, in support of this appeal, contends that the appellant has falsely been implicated in this case; that the learned trial court has totally disbelieved the version of the prosecution in its entirety but convicted and sentenced the appellant on the sole basis of her statement recorded under Section 342, Code of Criminal Procedure wherein she admitted that Abu Bakar (deceased) committed *zina* with her on pistol point and after committing zina, when the deceased put down the pistol for wearing his *shalwar*, the appellant picked up pistol and made fire shots at the deceased because of being raped; that the learned trial court disbelieved the presence of Ghulam Yaseen complainant (PW.5) and Muhammad Bilal (PW.6) at the place of occurrence as they are not residents of the locality where the occurrence took place; that the complainant admitted during his cross examination that it takes two hours for going from his house to the house of his brother Muhammad Shafi by motor vehicle whereas Muhammad Bilal (PW.6) stated that his house is at a distance of 12/13 miles from the place of occurrence; that the complainant made dishonest improvements before the learned trial court to strengthen the prosecution case; that the motive set up by the prosecution in the FIR was a domestic dispute of Abu Bakar (deceased) with Allah Ditta and his family members and in the morning of day of occurrence, hot words were exchanged between Allah Ditta and Muhammad Abu Bakar; that the complainant while appearing before the learned trial court twisted the motive by stating that Allah Ditta accused wanted to

give hand of his daughter Fauzia Bibi to Abu Bakar (deceased) but he refused and on the day of occurrence at morning time, a quarrel also took place between Abu Bakar and Allah Ditta accused; that the complainant stated during his cross examination that he do not know the time when the said quarrel took place between Abu Bakar and Allah Ditta accused, however, said quarrel had taken place prior to our arrival in the house of Muhammad Shafi at Mehtar Colony; that so far as medical evidence is concerned, learned counsel contends that the same may confirm the ocular account with regard to receipt of injury, nature of the injury, kind of weapon used in the occurrence but it would not tell the name of the assailant and moreover, it is a supportive piece of evidence and relevant only if the primary evidence i.e. ocular account inspires confidence, which is not the situation in this case; that the recovery of 30 bore pistol (P.4) and positive report of Forensic Science Laboratory (Ex.PQ) are concerned, learned counsel contends that the crime empties (P.6/1-5) were taken into possession from the spot on 01.12.2010, the appellant was arrested on 02.12.2010 and on the same day got recovered pistol (P.4) whereas crime empties and 30 bore pistol were sent to the F.S.L. together on 11.12.2010, therefore, it is not safe to rely on the report of F.S.L; that viewing from all angles, prosecution case was doubtful nature but the learned trial court convicted/sentenced the appellant merely on the basis of her statement recorded under Section 342, Cr.P.C. Learned counsel while relying on the case law reported as ***"Azhar Iqbal vs. The State"*** (2013 SCMR 383) prays for acquittal of the appellant.

5. None is present on behalf of the complainant despite issuance of notice. Therefore, this appeal is being decided after hearing learned counsel for the appellant and learned DDPP for the State.

6. On the other hand, learned Deputy District Public Prosecutor vehemently opposes this appeal on the grounds that this incident took place on 01.12.2010 at *Asar wela* and the matter was timely reported to the police on the same evening at 5.30 p.m; that the postmortem examination on the dead body was conducted on the same night i.e. 01.12.2010 at 10.20 p.m; that the complainant Ghulam Yaseen (PW.5)

and Muhammad Bilal (PW.6) have reasonably explained their presence at the place of occurrence; that a specific motive was set up in the FIR and the complainant explained the motive in detail before the learned trial court; that the case of prosecution was supported by the medical evidence and further corroborated by the recovery of pistol (P.4) at the instance of the appellant and positive report of Forensic Science Laboratory (Ex.PQ); that though the learned trial court disbelieved the case of the prosecution but while accepting the version of the appellant has rightly convicted and sentenced her to fourteen years simple imprisonment and there is no merit in this appeal.

7. I have heard arguments of learned counsel for the appellant as well as learned DDPP for the State, given serious consideration to their respective submissions and also perused the record.

8. Admittedly, it is a case of two versions, one set out in the FIR and brought on the record through the statements of prosecution witnesses, which has already been discussed in para 2 above and the second brought on the record through the statement of the appellant recorded under Section 342, Code of Criminal Procedure and put to the prosecution witnesses. In such like situation, the Court is required to analyze the prosecution version first in order to ascertain its truthfulness or otherwise. In this respect, I am guided by the judgment of the Hon'ble Supreme Court of Pakistan passed in the case reported as "**Ashiq Hussain Vs. State**" (PLD 1994 SC 879) wherein, at page 883, the Hon'ble Supreme Court has been pleased to observe as under: -

> "9. …The proper and the legal way of dealing with a criminal case is that the Court should first discuss the prosecution case/evidence in order to come to an independent finding with regard to the reliability of the prosecution witnesses, particularly the eye-witnesses and the probability of the story told by them, and then

examine the statement of the accused under section 342, Cr.P.C., statement under section 340(2), Cr.P.C. and the defence evidence. If the Court disbelieves/rejects/excludes from consideration the prosecution evidence, then the Court must accept the statement of the accused as a whole without scrutiny. If the statement under section 342, Cr.P.C. is exculpatory, then he must be acquitted. If the statement under section 342, Cr.P.C. believed as a whole, constitutes some offence punishable under the Code/law, then the accused should be convicted for that offence only. In case of counter versions, if the Court believes prosecution evidence and is not prepared to exclude the same from consideration, it will not straightaway convict the accused but will review the entire evidence including the circumstances appearing the case at close before reaching at a conclusion regarding the truth or falsity of the defence plea/version. All the factors favouring belief in the accusation must be placed in juxtaposition to the corresponding factors favouring the plea in defence and the total effect should be estimated in relation to the questions, viz., is the plea/version raised by the accused satisfactorily established by the evidence and circumstances appearing in the case? If the answer be in the affirmative, then the Court must accept the plea of the accused and act accordingly. If the answer to the question be in the negative, then the Court will not reject the defence plea as being false but will go a step further to find out

> whether or not there is yet a reasonable possibility of defence plea/version being true. If the Court finds that although the accused has failed to establish his plea/version to the satisfaction of the Court but his plea might reasonably be true, even then the Court must accept his plea and acquit or convict him accordingly."

The above view of the learned Apex Court of the country has been reiterated in another judgment reported as "**Amin Ali versus The State**" (2011 SCMR 323), therefore, following the principles settled by the Hon'ble Supreme Court of Pakistan in such like situation, first I will examine the case of the prosecution.

9. So far as presence of the witnesses of ocular account namely Ghulam Yaseen, complainant (PW.5) and Muhammad Bilal (PW.6) at the place of incident at the time of occurrence and the motive are concerned, the learned trial court in paras 23 and 25 of its judgment has disbelieved the same by observing that the complainant stated that it takes two hours for going from his house to the house of Muhammad Shafi father of the deceased by motor vehicle whereas Muhammad Bilal (PW.6) stated that his house is at a distance of 12/13 miles from the place of occurrence. The learned trial court further observed that the complainant and PWs Muhammad Bilal and Fayaz went to the house of Muhammad Shafi brother of complainant as he had to go to Saudi Arabia on the next day but neither the passport nor air ticket of Muhammad Shafi were produced before the police to prove this fact. With regard to the motive, the learned trial court has observed that the same was twisted by the complainant while appearing before the trial court. The complainant admitted in his cross examination that he does not know the time when the said quarrel took place between Abu Bakar and Allah Ditta accused, however, said quarrel had taken place prior to their arrival in the house of Muhammad Shafi at Mehtar Colony. As such, the prosecution remained unsuccessful to prove the motive.

10. As far as medical evidence is concerned, the same is a supporting piece of evidence, which may confirm the ocular account with regard to receipt of injury, nature of the injury, kind of weapon used in the occurrence but it would not tell the name of the assailant. Reference in this context may be made to the cases of "**Muhammad Tasaweer versus Hafiz Zulkarnain and 2 others**" (PLD 2009 SC 53), **"Altaf Hussain versus Fakhar Hussain and another"** (2008 SCMR 1103) and "**Mursal Kazmi alias Qamar Shah and another versus The State**" (2009 SCMR 1410), therefore, there is no need to discuss the medical evidence of the prosecution.

11. As regards recovery of 30 bore pistol (P.4) at the instance of the appellant and positive report of Forensic Science Laboratory (Ex.PQ) are concerned, I have noted that five crime empties (P.6/1-5) were taken into possession from the place of occurrence on 01.12.2010, the appellant was arrested on 02.12.2010 and she got recovered 30 bore pistol on the same day whereas both the crime empties and 30 bore pistol were received in the office of Forensic Science Laboratory on 11.12.2010 i.e. after ten days of the occurrence and after about nine days of the arrest of the appellant. It is, by now, well established proposition of law that if the crime empty is sent to the Forensic Science Laboratory after the arrest of the accused or together with the crime weapon, the positive report of the said Laboratory loses its evidentiary value. Reliance in this respect is placed on the case of ***"Jehangir vs. Nazar Farid and another"*** (2002 SCMR 1986), ***"Israr Ali vs. The State"*** (2007 SCMR 525) and ***"Ali Sher and others vs. The State"*** (2008 SCMR 707). In Israr Ali's case, the Hon'ble Supreme Court has observed that when the crime empties are sent to the Forensic Science Laboratory with delay, the recovery of the same does not provide strong corroboration qua the prosecution version.

12. I have noted that the learned trial court has rejected the version of the prosecution in its entirety and then proceeded to convict and sentence the appellant on the sole basis of her specific plea which is to the effect that Abu Bakar (deceased) committed *zina* with her on pistol point and after committing zina, when the deceased put down

pistol for wearing his *shalwar*, the appellant picked up pistol and made fire shots at the deceased in extreme anger because of being raped. I am of the view that the prosecution has failed to prove its case against the appellant beyond reasonable doubt, therefore, she (appellant) should have been acquitted even if she had taken a plea and thereby admitted killing the deceased. The statement of an accused person recorded under Section 342, Cr.P.C. is to be accepted or rejected in its entirety and where the evidence of prosecution is found to be reliable and the exculpatory part of the accused person's statement is established to be false and is to be excluded from consideration, then the inculpatory part of the accused person's statement may be read in support of the evidence of the prosecution. In this respect, reliance may be placed on the case reported as ***"Azhar Iqbal vs. The State"*** (2013 SCMR 383), wherein at pages 384 and 385, the Hon'ble Supreme Court has been pleased to observe as under: -

> "2. …it has straightaway been observed by us that both the learned courts below had rejected the version of the prosecution in its entirety and had then proceeded to convict and sentence the appellant on the sole basis of his statement recorded under section 342, Cr.P.C. wherein he had advanced a plea of grave and sudden provocation. It had not been appreciated by the learned courts below that the law is quite settled by now that if the prosecution fails to prove its case against an accused person then the accused person is to be acquitted even if he had taken a plea and had thereby admitted killing the deceased. A reference in this respect may be made to the case of Waqar Ahmed v. Shaukat Ali and others (2006 SCMR 1139). The law is equally settled that the statement of an accused person recorded under section 342, Cr.P.C. is to be accepted or rejected in its entirety and where the prosecution's evidence is found to be reliable and the exculpatory part of the accused person's statement is established to be

> false and is to be excluded from consideration then the inculpatory part of the accused person's statement may be read in support of the evidence of the prosecution. This legal position stands amply demonstrated in the cases of *Sultan Khan* v. *Sher Khan and others* (PLD 1991 SC 520), *Muhammad Tashfeen and others* v. *The State and others* (2006 SCMR 577) and *Faqir Muhammad and another* v. *The State (PLD 2011 SC 796)*…"

13. Seeking guidance from the dictum of law laid down by the apex court in Azhar Iqbal's case (supra), this appeal is allowed. Conviction and sentence awarded to Mst. Amena Gulnaz alias Aimena (appellant) vide judgment dated 14.09.2011 passed by the learned Sessions Judge, Dera Ghazi Khan are set aside and the appellant is acquitted of the charge framed against her. Mst. Amena Gulnaz alias Aimena (appellant) is present in Court, on bail. Her surety stands discharged from the liability of bail bond.

(Shehram Sarwar Ch.)
Judge

Approved for reporting.

Judge

Arshad