

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE IJAZ UL AHSAN

MR. JUSTICE YAHYA AFRIDI

MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

(D.J) AFR

JAIL PETITION NO. 154 OF 2016 AND

CRIMINAL PETITION NO. 108-L OF 2016

(Against the judgment dated 23.12.2015 passed by the Lahore High Court, Lahore passed in Criminal Appeal No. 810/2011 & Murder Reference No. 209/2011)

Shamsher Ahmad

(In JP 154/2016)

Manzoor Ahmed (complainant)

(In Cr.P. 108-L/2016)

...Petitioner(s)

VERSUS

The State

(In JP 154/2016)

Shamsher Ahmad and another

(In Cr.P. 108-L/2016)

...Respondent(s)

For the Petitioner(s):

Malik Matee Ullah, ASC

(In JP 154/2016) *(via video link @Lahore).*

Mr. Saiful Malook, ASC

(In Cr.P. 108-L/2016)

For the State:

Mirza Abid Majeed, DPG

Date of Hearing:

01.08.2022

JUDGMENT

SAYYED MAZAHAR ALI AKBAR NAQVI, J.- Petitioner Shamsher Ahmed was tried by the learned Sessions Judge, Mianwali pursuant to a case registered vide FIR No. 185 dated 03.06.2009 under Section 302 PPC at Police Station Kundian, District Mianwali for committing murder of Ishtiaq Ahmed, son of the complainant. The learned Trial Court vide its judgment dated 28.04.2011 convicted petitioner Shamsher Ahmed under Section 302(b) PPC and sentenced him to death. He was also directed to pay compensation amounting to Rs.200,000/- to the legal heirs of the deceased or in default whereof to further suffer six months SI. In appeal the learned High Court while maintaining the conviction of the

petitioner/convict under Section 302(b) PPC, altered the sentence of death into imprisonment for life. The amount of compensation and the sentence in default whereof was maintained. Benefit of Section 382-B Cr.P.C. was also extended to the petitioner/convict. Being aggrieved by the impugned judgment, the petitioner/convict filed Jail Petition No. 154/2016 whereas the complainant has filed Criminal Petition No. 108-L/2016 before this Court seeking enhancement of the sentence of the petitioner/convict.

2. The prosecution story as given in the judgment of the learned Trial Court reads as under:-

"2. The brief facts of the case are that Manzoor Ahmed complainant (PW-6) got registered FIR (Ex.PE) alleging that he is resident of Doaba and serving as a teacher in Elementary School, Jaal Shumali, his sister Mst. Wazir Khatoon widow of Malik Gul Sher is residing in Mohallah Seelwan, Kundian along with her children and is a patient of paralysis. Yesterday at Degar vela he along with Ishtiaq Ahmed his son aged 18 years and Riaz Ahmed son of Allah Ditta went to inquire about her health, after having dinner he along with Riaz Ahmed, Ishtiaq Ahmed his son and Sami Ullah son of his sister came on Jernaili Road for easy load and did the needful after having tea at the hotel and then returned back at about 10.15 PM when they reached in front of house of Malik Gul Sher deceased, then Shamsher Ahmed accused armed with double barrel 12 bore gun came from the front street and raised a lalkara at Ishtiaq Ahmed his son to be prepared as he has come to teach him a lesson being an impediment in his marriage from the house of Gul Sher and fired a shot with his 12 bore double barrel gun hitting his son Ishtiaq Ahmed on the chest who fell down after receiving the injury; that the occurrence was seen by Riaz Ahmed and Sami Ullah in the tube light installed on the main gate along with the complainant. The motive for the occurrence is that Shamsher Ahmed accused wanted to tie the knot with the daughter of his sister but his sister had refused to accede to his request to which the accused Shamsher Ahmed had a grouse that the deceased was hurdle in his way to be married from the house of Gul Sher, therefore, due to this reason he has committed Qatl-e-Amad of Ishtiaq Ahmed, his son with 12 bore double barrel gun. The accused ran away while brandishing the gun towards east, they did not went near due to fear and took Ishtiaq Ahmed in injured condition to hospital who succumbed to the injuries after reaching in the hospital."

3. After completion of the investigation, report under Section 173 Cr.P.C. was submitted before the Trial Court. The prosecution in order to prove its case produced 11 witnesses. In his statement recorded under Section 342 Cr.P.C, the petitioner/convict pleaded his innocence and refuted all the allegations leveled against him. However, he did not make

his statement on oath under Section 340(2) Cr.P.C in disproof of allegations leveled against him. He also did not produce any evidence in his defence.

4. Learned counsel for the petitioner/convict contended that there is a delay of about three hours in lodging the FIR whereas the *inter se* distance between the place of occurrence and the police station was 1 & ½ kilometers. Contends that it was a night time occurrence and it was not possible for the prosecution witnesses to identify the accused. Contends there are glaring contradictions and dishonest improvements in the statements of the eye-witnesses, which have escaped the notice of the learned courts below. Contends that the prosecution witnesses are interested and related, therefore, their evidence has lost its sanctity and the conviction cannot be based upon it. Contends that the prosecution case is based on whims and surmises and it has to prove its case without any shadow of doubt but it has miserably failed to do so. Contends that the prosecution has not been able to prove motive as alleged, which causes serious dent in the prosecution case. Contends that the recovery of weapon of offence in absence of recovery of empty is inconsequential. Contends that the postmortem was conducted after eight hours of the occurrence for which no reason is given. Lastly contends that the reasons given by the learned High Court to sustain conviction of the petitioner are speculative and artificial in nature, therefore, the impugned judgment has to be set at naught.

5. On the other hand, learned Law Officer assisted by learned counsel for the complainant submitted that the learned High Court has converted the sentence of death of the petitioner on the grounds, which are not tenable in law. Contend that to sustain conviction of an accused on a capital charge, un-rebutted ocular evidence alone is sufficient. Lastly contend that the ocular account is supported by the medical evidence, therefore, the petitioner/convict does not deserve any leniency by this Court. Learned counsel for the complainant vehemently argued that the sentence of the petitioner/convict may be enhanced.

6. We have heard learned counsel for the parties at some length and have perused the evidence available on the record with their able assistance.

The ocular account in this case has been furnished by Manzoor Ahmed, complainant (PW-6) and Samiullah (PW-7). These prosecution witnesses were subjected to lengthy cross-examination by the defence but nothing favourable to the petitioner/convict or adverse to the prosecution could be produced on record. Both these PWs remained consistent on each and every material point inasmuch as they made deposition exactly according to the circumstances happened in this case, therefore, it can safely be concluded that the ocular account furnished by the prosecution is reliable, straightforward and confidence inspiring. The medical evidence available on the record corroborates the ocular account so far as the nature, time, locale and impact of the injury on the person of the deceased is concerned. So far as the argument of learned counsel for the petitioner that the medical evidence contradicts the ocular version is concerned, we may observe that where ocular evidence is found trustworthy and confidence inspiring, the same is given preference over medical evidence. It is settled that casual discrepancies and conflicts appearing in medical evidence and the ocular version are quite possible for variety of reasons. During occurrence when live shots are being fired, witnesses in a momentary glance make only tentative assessment of points where such fire shots appeared to have landed and it becomes highly improbable to mention their location with exactitude. However, learned counsel could not point out as to how the medical evidence contradicts the ocular evidence. As far as the question that the complainant was father of the deceased, therefore, his testimony cannot be believed to sustain conviction of the petitioner/convict is concerned, it is by now a well established principle of law that mere relationship of the prosecution witnesses with the deceased cannot be a ground to discard the testimony of such witnesses unless previous enmity or ill will is established on the record to falsely implicate the accused in the case. Samiullah (PW-7) was son of Mst. Wazir Khatoon, sister of the complainant

and resident of the same area where the occurrence took place whereas the complainant has reasonably explained his presence at the place of occurrence. According to him, he went to his paralyzed sister's house to inquire about her health. Learned counsel for the petitioner/convict could not point out any reason as to why the complainant has falsely involved the petitioner/convict in the present case and let off the real culprit, who has committed murder of his real son. Substitution in such like cases is a rare phenomenon. The complainant would not prefer to spare the real culprit who murdered his son and falsely involve the petitioner without any rhyme and reason. During the course of proceedings, the learned counsel contended that there are material discrepancies and contradictions in the statements of the eye-witnesses but on our specific query he could not point out any major contradiction, which could shatter the case of the prosecution. While appreciating the evidence, the court must not attach undue importance to minor discrepancies and such minor discrepancies which do not shake the salient features of the prosecution case should be ignored. The accused cannot claim premium of such minor discrepancies. If importance be given to such insignificant inconsistencies then there would hardly be any conviction. Reliance is placed on Allah Bakhsh Vs. Ahmad Din (1971 SCMR 462). So far as the delay of about 2 hours 45 minutes in lodging the FIR is concerned, the complainant in his cross-examination has reasonably explained the delay by furnishing the details about the consuming of time as it took 15/20 minutes at the spot, about 30 minutes in reaching the hospital, he remained in hospital for about one hour and then reached the police station in another 35-40 minutes where he had to wait for the SHO for more than an hour. Learned counsel for the petitioner/convict had argued that as it was a night time occurrence, therefore, it was not possible for the prosecution witnesses to identify the accused. However, this argument of the learned counsel is misconceived as the petitioner is paternal cousin of Samiullah (PW-7), therefore, the parties were known to each other and no question of mistaken identify arises. Even otherwise, the prosecution witnesses of ocular account had clearly mentioned that a tube-light was glowing at the

main gate of Mst. Wazir Khatoon, sister of the complainant, in front of which the occurrence took place. Although it has been argued that the tube-light, which has been shown as source of the light was not taken into possession and as such it hampers the prosecution case. However, this aspect of the argument has no legal foundation. Firstly, it depends upon the ownership of the article, which ultimately provided the source for identification, and secondly, it is for the Investigating Officer either he deems it essential or otherwise. Even if this aspect of the argument is evaluated broadly, it is suffice to state that this principle is not absolute because it depends upon (i) source, (ii) question of ownership, (iii) public or private, & (iv) essential to show the source. When all these matters are taken into consideration, it is established that it was a tube-light and as such the same cannot be made part of case property merely on the ground that the assailant was identified from the source, which has been shown. This source of light is also established from the rough site plan as well as scaled site plan, which is essential part of the prosecution case. The delay of about eight hours in conducting postmortem examination is also not beneficial to the petitioner/convict. The occurrence took place at 10.15 PM whereas the FIR was lodged at 1.00 am (mid night) and it was after the registration of FIR that the state machinery came into action and after usual proceedings the postmortem examination was conducted at 6.15 am in the morning i.e. after five hours of registration of FIR. After the occurrence, the petitioner also remained absconder for about six months, which is also a corroboratory piece of evidence against him. The learned High Court has rightly disbelieved the motive by holding that there is no positive proof that the deceased was instrumental in rejection of matrimonial proposal sent by the petitioner. So far as the recovery of weapon of offence i.e. .12 bore rifle is concerned, admittedly no empty was recovered from the place of occurrence, which could be sent to Forensic Science Laboratory for analysis, therefore, the recovery is inconsequential. In these circumstances, there is sufficient evidence available to sustain the conviction of the petitioner/convict. So far as the quantum of punishment is concerned, keeping in view the fact that

recovery is inconsequential and motive has not been proved, the learned High Court has rightly taken a lenient view and converted the sentence of death into imprisonment for life. No further leniency can be shown to the petitioner. The impugned judgment is well reasoned, proceeds on correct principles of law on the subject and does not call for interference by this Court.

7. For what has been discussed above, we do not find any merit in these petitions, which are dismissed and leave to appeal is refused. The above are the detailed reasons of our short order of even date. /

Islamabad, the
1st of August, 2022
Approved For Reporting
Khurram