IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

CRIMINAL APPEAL NO. 398 OF 2020
(Against the judgment dated 01.02.2018 passed by the Lahore High Court, Rawalpindi Bench in Criminal Appeal No. 281/2015, Criminal Revision No. 130/2015 & Murder Reference No. 36/2015)

Sajid Mehmood

...Appellant(s)

VERSUS

The State

...Respondent(s)

For the Appellant(s): Mr. Muhammad Ahsan Bhoon, ASC
Syed Ali Imran, ASC
Syed Rifaqat Hussain Shah, AOR

For the State: Mr. Ahmed Raza Gillani, Addl.P.G.

Date of Hearing: 31.05.2022

JUDGMENT

SAYYED MAZAHAR ALI AKBAR NAQVI, J.- Appellant Sajid Mehmood along with three co-accused was tried by the learned Sessions Judge, Jhelum in terms of the case registered vide FIR No. 13 dated 16.01.2014 under Sections 302/34 PPC at Police Station Civil Line, District Jhelum, for committing murder of Azeem Ahmed, brother of the complainant. The learned Trial Court vide its judgment dated 23.06.2015 while acquitting the co-accused, convicted appellant Sajid Mehmood under Section 302(b) PPC and sentenced him to death. He was also directed to pay compensation amounting to Rs.500,000/- to the legal heirs of the deceased. In case of non-payment of the compensation, the same was ordered to be recovered as arrears of land revenue and the appellant was

to suffer SI for six months. In appeal the learned High Court while maintaining the conviction of the appellant under Section 302(b) PPC, altered the sentence of death into imprisonment for life. The amount of compensation and the mode of recovery thereof was maintained. Benefit of Section 382-B Cr.P.C. was also extended to the appellant. Being aggrieved by the impugned judgment, the appellant filed Jail Petition No. 160/2018 wherein leave was granted by this Court on 02.06.2020 and the present appeal has arisen out of the same.

2. The prosecution story as given in the impugned judgment reads as under:-

> "2. The brief facts of the case as unfolded in the FIR, recorded on the statement of Jameel Hussain, complainant (PW-10) are that on 16.01.2014, he (complainant) alongwith his father Karamat Hussain, PW and his brother Zameer Ahmad was present outside the gate of his house for participating in Milad Sharif in the mosque, when at about 8.30 p.m. Azeem Ahmed, deceased (brother of complainant) came there on his white coloured cultus car bearing registration No. LW/9991 from city side. Azeem Ahmad (deceased) parked his car in front of his house and as soon as he alighted from his car, accused persons namely Sajid Mehmood alias Saja, Aurangzeb alias Ranga, Abdul Samad all armed with the pistol 30 bore respectively also arrived thereon white colour car being driven by Shahid alias Sando, the accused Aurangzeb alias Rangha raised a lalkara and consequently Sajid Mehmood alias Saja made a straight fire shot of his pistol targeting left thigh of Azeem Ahmad. On receipt of this pistol's fire Azeem Ahmad fell down on the ground and succumbed to his injuries on the spot and accused persons on their car vanished from the place of occurrence. The occurrence was witnessed by complainant, Zameer Hussain (PW-1) and Karamat Hussain (since given up).
>
> The motive behind the occurrence was that on the previous night of the occurrence, the accused persons had got set on fire the Haveli of the complainant party and falsely involved Junaid and others in the occurrence; the respectable of the locality had patched up that matter between the complainant party and Junaid and others; due to this grudge, the accused committed the murder of complainant's brother. Hence, the crime report."

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 13 witnesses. In his statement recorded under Section 342 Cr.P.C the appellant 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 appellant contended that it was an un-witnessed occurrence and the whole prosecution case is concocted one. Contends that even 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 complainant was brother of the deceased, therefore, his testimony cannot be believed to sustain the conviction of the appellant. Contends that there is conflict between medical and ocular account. Contends that the postmortem examination was conducted after two hours of the occurrence and in such a short span of time, the rigor mortis could not develop as such contradicted time of occurrence. Contends that according to prosecution witnesses, the dead body of the deceased was brought to the hospital in car whereas according to Dr. Saeed Anwar (PW-7), the dead body was brought by Rescue 1122, which speaks volumes on the conduct of the prosecution witnesses. Contends that although Zameer Hussain (PW-11) was mentioned as witness in the FIR but the Police did not record his statement under Section 161 Cr.P.C., therefore, the said witness could not be examined to corroborate the solitary evidence of other eye-witness i.e. the complainant.

5. On the other hand, learned Law Officer has defended the impugned judgment by contending that the judgment of the learned High Court is well reasoned, based on correct principles of law and has examined the evidence in its true perspective, therefore, the same does not call for any interference by this Court.

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 Ch. Jameel Hussain, complainant (PW-10) and Zameer Hussain (PW-11). These

prosecution witnesses were subjected to lengthy cross-examination by the defence but nothing favourable to the appellant 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 and impact of the injury on the person of the deceased is concerned. So far as the argument of learned counsel for the appellant 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 turmoil 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. As far as the question that the complainant was brother of the deceased, therefore, his testimony cannot be believed to sustain conviction of the appellant 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. Both these PWs were inmates of the house, in front of which occurrence took place, therefore, their presence was natural and the same is fully established from the record. Learned counsel for the appellant could not point out any reason as to why the complainant has falsely involved the appellant in the present case and let off the real culprit, who has committed murder of his real brother. Substitution in such like cases is a rare phenomenon. The complainant would not prefer to spare the real culprit who murdered his brother and falsely involve the appellant 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.

7. It was one of the arguments of learned counsel for the appellant that although Zameer Hussain (PW-11) was mentioned as witness in the FIR but his statement under Section 161 Cr.P.C. was not recorded, therefore, his testimony cannot be relied upon to sustain conviction of the appellant. However, we do not tend to agree with the learned counsel. To arrive at a just conclusion, the courts can call any person likely to be acquainted with the facts of the case after ascertaining it from the Public Prosecutor or the complainant, subject to general provisions that summoning of any such witness does not cause delay or defeat the ends of justice. Section 265-F(2) of the Code of Criminal Procedure empowers the Courts to summon a person, after having been ascertained from the Public Prosecutor or the complainant, who is likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution. Section 265(7) grants even to the accused a right to apply for summoning any witness and production of documents. The very purpose of Section 265-F is to ensure the concept of a fair trial and to achieve this purpose equal opportunity has been given to both the accused and the prosecution for summoning the evidence. There is nowhere mentioned in this Section that only those witnesses could be examined whose statements under Section 161 Cr.P.C. have been recorded. Under this provision of law i.e. Section 265-F the Trial Court is not bound to record the statements of only those witnesses who have been listed in the calendar of witnesses. On the other hand, Section 540 Cr.P.C. empowers the Trial Court to summon a material witness even if his

name did not appear in the column of witnesses provided his evidence is deemed essential for the just and proper decision of the case. In the present case, although the statement of Zameer Hussain (PW-11) under Section 161 Cr.P.C. could not be recorded by the Police yet the fact remains that he was named as an eyewitness in the very FIR and was fully acquainted with the facts and circumstances of the case. It would be advantageous to reproduce Section 540, Cr.P.C., which is as follows:-

> "540. Power to summon material witness, or examine persons present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case".

8. This section is divisible in two parts. In the first part, discretion is given to the Court and enables it at any stage of an inquiry, trial or other proceedings under the Code, (a) to summon anyone as a witness, or (b) to examine any person present in the Court, or (c) to recall and re-examine any person whose evidence had already been recorded. On the other hand, the second part appears to be mandatory and requires the Court to take any of the steps mentioned above if the new evidence appears to it essential to the just decision of the case. The object of the provision, as a whole, is to do justice not only from the point of view of the accused and the prosecution but also justice from the point of view of the society. The Court examines evidence under this section neither to help the prosecution nor to help the accused. It is done neither to fill up any gaps in the prosecution evidence nor to give it any unfair advantage against the accused. Fundamental thing to be seen is whether the Court considers this evidence necessary in the facts and circumstances of the particular case before it. If this results in only "filling of lacuna" that is purely a subsidiary factor and cannot be taken into consideration. There is no bar that a witness, whose statement under Section 161 Cr.P.C. had not been recorded at the time of investigation, cannot be allowed to examine under Section 540 Cr.P.C. When a witness examined in Court, whose

statement has not been recorded at the time of investigation under Section 161, Cr.P.C., the evidentiary value to be attached to the evidence of such witness has to be looked into and if it is found that prejudice has been caused to the accused then the evidence of such witness may or may not be acted upon. Therefore, the argument of the learned counsel for the appellant is misconceived.

9. In Abid Ali Vs. The State (2011 SCMR 208), this Court has held that to believe or disbelieve a witness, all depends upon intrinsic value of the statement made by him. There cannot be universal principle that in every case, interested witnesses should be disbelieved or disinterested witnesses be believed. It all depends upon the rule of prudence and reasonableness to hold that a particular witness was present on scene of crime and that he is making true statement. Person who is reported otherwise to be very honest, aboveboard and very respectable in society, if gives a statement which is illogical and unbelievable, no prudent man despite his nobility would accept such statement. As a rule of criminal jurisprudence, prosecution evidence is not tested on the basis of quantity but quality of evidence. It is not that who is giving evidence and making statement. What is relevant is what statement has been given and it is not the person but the statement of that person which is to be seen and adjudged. In Niaz-ud-Din Vs. The State (2011 SCMR 725), it was held that conviction in a murder case can be based on the testimony of a single witness, if court is satisfied that he is reliable and it is the quality of evidence and not the quantity which matters. The same was the view of this Court in Asim Vs. The State (2005 SCMR 417), Lal Khan Vs. The State (2006 SCMR 1846) and Muhammad Sadiq Vs. The State (2022 SCMR 690). In this view of the matter, even if the testimony of Zameer Hussain is discarded, the evidence of complainant is sufficient to sustain conviction of the appellant.

10. So far as recovery of crime weapon is concerned, after his arrest on 26.01.2014, the appellant got recovered .30 bore pistol and the same was sent to Forensic Science Laboratory on 04.02.2012. The one crime empty had already been sent to office of Forensic Science

Laboratory on 27.01.2012. According to the report, the empty was found fired from the pistol got recovered from the appellant. Although, the Police sent the crime empty after ten days of the occurrence to the FSL and the same should have been sent without unnecessary delay after being collected from the spot but this laziness would not render the recovery inconsequential. It was argued by the learned counsel that according to prosecution witnesses, the dead body of the deceased was brought to the hospital in car whereas according to Dr. Saeed Anwar (PW-7), the dead body was brought by Rescue 1122. However, this could not help the appellant simply for the reason that the document, which shows that the deceased was taken to hospital by Rescue 1122, is inadmissible in evidence as neither the author of the said document nor anyone on his behalf appeared before the Trial Court to verify the same. The said document, which is available at page 196 of the paper book, was also not brought on the judicial record. Even otherwise, the learned Trial Court has very rightly dealt with this issue and observed that during cross-examination, the doctor tried to give concession to the accused persons and stated that the dead body was brought by Rescue 1122 but in his re-examination he admitted that in documents there was no mention that the dead body was brought by Rescue 1122. The learned High Court has disbelieved the motive part of the prosecution story by observing that the complainant is neither the eyewitness of the incident of burning of *haveli* nor was present in the meeting where compromise was effected. According to him, his brother Shakeel had informed him but the said Shakeel was not examined during the trial in order to prove the motive part of the prosecution story. We find no reason to differ with this finding of the learned High Court. It was argued by the learned counsel that the postmortem examination was conducted after two hours of the occurrence and at that time rigor mortis had fully developed, which according to him, shows that the deceased had died long ago before the given time of incident. The phrase rigor mortis is latin with *rigor* meaning stiffness and *mortis* meaning death. Rigor mortis is a temporary condition. Depending on body temperature and other conditions, rigor mortis lasts approximately for 72 hours. The phenomenon is caused by the skeletal

muscles partially contracting. The muscles are unable to relax, so the joints become fixed in place. Factors that affect rigor mortis include (i) temperature/weather, (ii) physical exertion, (iii) age, (iv) body fat, (v) any illness the person had at the time of death, (vi) sun exposure, (vii) gender, (viii) body structure, (ix) genetics, (x) tribe & (xi) inhabitation. Admittedly, the occurrence took place in the night of January and development of rigor mortis in the cold days is not surprising. So far as the quantum of punishment is concerned, the learned High Court while taking into consideration the fact that the motive part of the prosecution story is not proved; there was no blood feud between the parties; what actually preceded just before the occurrence remained shrouded in mystery; appellant only fired single shot and co-accused of the appellant have been acquitted by the learned Trial 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 appellant. The impugned judgment is well reasoned, proceeds on correct principles of law on the subject and does not call for interference by this Court.

11. For what has been discussed above, we do not find any merit in this appeal, which is dismissed. The above are the detailed reasons of our short order of even date.

Islamabad, the
31st of May, 2022
Approved For Reporting
Khurram