

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Asif Saeed Khan Khosa
Mr. Justice Dost Muhammad Khan
Mr. Justice Sardar Tariq Masood

Criminal Appeal No. 199 of 2011

(Against the judgment dated 19.06.2009 passed by the Lahore High Court, Lahore in Criminal Appeal No. 171 of 2006 and Capital Sentence Reference No. 53-T of 2003)

Dr. Irfan Iqbal

...Appellant

versus

The State

...Respondent

For the appellant:

Mr. Aitzaz Ahsan, Sr. ASC
Mr. M. S. Khattak, AOR

For the complainant:

Mr. Babar Awan, Sr. ASC
Raja Abdul Ghafoor, AOR

For the State:

Mr. Muhammad Abdul Wadood,
Deputy Prosecutor-General, Punjab

Date of hearing:

23.11.2016

JUDGMENT

Asif Saeed Khan Khosa, J.: Dr. Irfan Iqbal appellant was booked in case FIR No. 700 registered at Police Station Ganj Mandi, District Rawalpindi on 18.12.2002 in respect of offences under sections 302, 324 and 1099, PPC and section 7 of the Anti-Terrorism Act, 1997 and after a regular trial conducted in a connected private complaint he was convicted by the trial court for an offence under section 7(a) of the Anti-Terrorism Act, 1997 and was sentenced to death and to pay a fine of Rs. 3,00,000/- or in default of payment of thereof to undergo rigorous imprisonment for

one year. The appellant challenged his conviction and sentence before the Lahore High Court, Rawalpindi Bench, Rawalpindi through an appeal which was dismissed by the said Court and the connected Capital Sentence Reference was answered in the affirmative. While passing the impugned judgment the High Court had additionally convicted the appellant for an offence under section 302(b), PPC and had sentenced him to death on that score as well besides ordering him to pay compensation to the heirs of the deceased. Hence, the present appeal by leave of this Court granted on 28.04.2011.

2. While granting leave to appeal in this case this Court had clearly observed on 28.04.2011 that leave to appeal was not being granted for reconsideration of the merits of the appellant's case but leave to appeal had been granted only to examine the following questions:

- “(a) Whether the learned Division Bench of the Lahore High Court was right in holding that the appellant was sentenced only under Section 7(a) ATA was convicted and sentenced under section 302(b) PPC, as reproduced hereinabove in para-5 of this order;*
- (b) Whether in the given circumstances and submission made by the learned counsel for the petitioner case of the petitioner fall within the scope of Section 302(c) PPC; and*
- (c) If the case of the petitioner does not fall within the scope of Section 302(c) PPC, whether the sentence of death is warranted in this case.”*

We have heard the learned counsel for the parties on the said aspects of the case at some length and have also perused the record with their assistance.

3. As regards the first question referred to in the leave granting order we have straightaway observed that no charge had been framed by the trial court against the appellant in respect of an offence under section 302(b), PPC, no conviction of the appellant had been recorded by the trial court for the offence under section 302(b), PPC, no appeal or revision petition had been filed by the

State or the complainant party before the High Court seeking conviction of the appellant for the offence under section 302(b), PPC and admittedly no notice had been issued by the High Court to the appellant before convicting and sentencing him for the offence under section 302(b), PPC. The provisions of section 423(1)(b), Cr.P.C. clearly show that a sentence passed against a convict cannot be enhanced by a court hearing an appeal against conviction and if at all while hearing such an appeal the Court is minded to enhance the convict's sentence then the Court can exercise its revisional jurisdiction but in exercise of revisional jurisdiction no sentence of a convict can be enhanced without notice to him as is evident from the provisions of subsections (2) and (6) of section 439, Cr.P.C. Admittedly no such notice had been issued by the High Court to the appellant. In this view of the matter while answering question No. 1 in the leave granting order we hold that the High Court was not justified in this case in additionally convicting and sentencing the appellant for the offence under section 302(b), PPC while hearing the appellant's appeal against conviction.

4. Question No. 2 in the leave granting order is about applicability or otherwise of the provisions of section 302(c), PPC to the case in hand and in that context we may observe that it has been clarified by this Court in the case of Zahid Rehman v. The State (PLD 2015 SC 77) that the provisions of section 302(c), PPC stand attracted to the cases falling in the Exceptions to the erstwhile provisions of section 300, PPC. In this context the Exception that came closest to the facts of the present case was Exception 1 which dealt with cases of grave and sudden provocation and we have noticed that in the case in hand there might have been grave provocation offered to the accused party by Waseem Hassan deceased and his injured brother namely Asim Hassan but at the time of commission of the alleged murder the said provocation had no longer remained sudden. According to the facts of this case after the appellant's brother namely Nasir Iqbal had been fired at and critically injured by Waseem Hassan

deceased and his brother namely Asim Hassan inside the house of the appellant and his family in which incident both Waseem Hassan deceased of the present case and his brother namely Asim Hassan had also received injuries the deceased and his injured brother had been removed to a hospital for treatment and the present occurrence had taken place inside that hospital when the appellant and his father had gone to the said hospital and had then caused injuries to Waseem Hassan deceased and his brother namely Asim Hassan. It is, thus, evident that the case in hand was not a case of an immediate response by the accused party to the violence committed or provocation offered by the members of the complainant party and there was a gap of time between the two incidents. We have, therefore, entertained no manner of doubt that the present occurrence was a direct result of the grave provocation offered by the complainant party but such provocation was no longer sudden at the time of the present occurrence and, thus, Exception 1 to the erstwhile provisions of section 300, PPC did not stand attracted in its entirety and, therefore, the case in hand did not fall squarely within the ambit of section 302(c), PPC.

5. The third question mentioned in the leave granting order pertains to availability or otherwise of any mitigating circumstance for the purpose of reduction of the appellant's sentence of death to imprisonment for life. In the said context the facts of the case show that even according to the case of the prosecution itself the appellant had reached the place of occurrence, i.e. the relevant hospital in the company of his father namely Sheikh Muhammad Iqbal and at that time the appellant was empty-handed whereas the appellant's father carried a revolver with him. The FIR as well as the statements of the eyewitnesses made before the trial court clearly show that it was the appellant's father who had handed over the revolver to the appellant at the spot with a command that the appellant should spare none from the complainant party. It is evident from such facts asserted by the prosecution that at the time of the present occurrence the appellant was acting under the influence of his father. Apart from that it has already been

observed by us while attending to question No. 2 in the leave granting order that the case in hand has been found by us to be a case of grave provocation offered by the complainant party to the appellant and the other members of his family but the element of suddenness in such provocation was missing so as to completely attract Exception 1 to the erstwhile provisions of section 300, PPC. In a somewhat similar backdrop this Court had observed in the case of Ghulam Abbas v. Mazher Abbas and another (PLD 1991 SC 1059) as follows:

"It has been ruled in a number of cases by the superior Courts that in case some of the conditions in the exceptions to section 300, P.P.C. are substantially satisfied but others are not then the least that the Court can do in such a difficult situation is that it may award lesser sentence but under the charge of murder; because, for acquittal from that charge and conviction for the lesser offence under section 304, Part I, P.P.C., all the conditions of an exception must be satisfied."

(underlining has been supplied for emphasis)

Following the principle laid down in the above mentioned precedent case and also keeping in view the conclusion reached by us that the appellant had acted at the relevant time under the influence of his father we have felt persuaded to reduce the sentence of death passed against the appellant to imprisonment for life on the charge under section 7(a) of the Anti-Terrorism Act, 1997.

6. For what has been discussed above this appeal is dismissed to the extent of the appellant's conviction for the offence under section 7(a) of the Anti-Terrorism Act, 1997, his sentence passed for the said offence is reduced from death to imprisonment for life and his conviction and sentence for the offence under section 302(b), PPC are set aside. The order passed by the trial court in respect of payment of fine by the appellant as well as the order passed in respect of imprisonment in default of payment of fine are, however, maintained. The benefit under section 382-B, Cr.P.C.

shall be extended to the appellant. This appeal is disposed of in these terms.

Judge

Judge

Judge

Islamabad

23.11.2016

Approved for reporting.

Arif