IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
MR. JUSTICE YAHYA AFRIDI
MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI
MR. JUSTICE MUHAMMAD ALI MAZHAR

JAIL PETITION NO. 405 OF 2021 AND
CRIMINAL PETITION NO. 946 OF 2021
(Against the judgment dated 31.03.2021 passed by the Lahore High Court, Lahore in Criminal Appeal No. 453-J/2014)

(i) Ansar, (ii) Maqsood Ahmed, (iii) Mumtaz Ahmed (iv) Nasir, and (v) Nisar Ahmed **(In JP 405/2021)** **(In Cr.P. 946/2021)**

...Petitioners

VERSUS

The State etc **(In both cases)**

...Respondent(s)

For the Petitioner(s): Mrs. Tabinda Islam, ASC
Syed Rifaqat Hussain Shah, AOR
(In Cr.P. 946/2021)

Mehnaz Bibi, sister of Ansar, in person
(In JP 405/2021)

For the Complainant: Mr. Rashad Javaid Lodhi, ASC

For the State: Mirza Muhammad Usman, DPG

Date of Hearing: 02.03.2023

JUDGMENT

SAYYED MAZAHAR ALI AKBAR NAQVI, J.- Petitioners along with co-accused Naveed Ahmed were tried by the learned Additional Sessions Judge, Shakargarh, pursuant to a case registered vide FIR No. 578/2011 dated 24.10.2011 under Sections 302/324/396 PPC at Police Station Shakargarh, District Narowal for committing dacoity cum murder of Muhammad Javed Rafique and for attempting to take life of Sarfraz Rafiq.

The learned Trial Court vide its judgment dated 09.07.2014 while acquitting the co-accused Naveed Ahmed, convicted the petitioners as under:-

i) **Under Section 302 PPC read with Section 149 PPC**
Sentenced to undergo imprisonment for life alongwith compensation of Rs.200,000/- each as envisaged under Section 544-A Cr.P.C. to be defrayed to the legal heirs of the deceased Muhammad Javed Rafique and in default whereof to further undergo SI for six months.

ii) **Under Section 396 PPC**
Sentenced to undergo imprisonment for life along with fine of Rs.50,000/- and in default whereof to further undergo SI for six months.

iii) **Under Section 324 PPC read with Section 149 PPC**
Ten years RI along with fine of Rs.20,000/- and in default whereof to further undergo SI for one month.

All the sentences were ordered to run concurrently. Benefit of Section 382-B Cr.P.C. was also extended to the petitioners.

2. In appeal, the learned High Court maintained the convictions and sentences recorded by the learned Trial Court. The prosecution story as given in the impugned judgment reads as under:-

> "2. The prosecution's story as projected through FIR (Exh.PA) reflects that during the night of 23/24.10.2011 at about 1.30 AM, Fazal Mehmood alias Allah Ditta, the complainant (PW-1) alongwith his family members were sleeping in their house. The electric bulb was on, therefore, there was sufficient light in the courtyard. Meanwhile 9/10 persons, one of them was about six feet height whereas rest were of medium height with agile bodies, wearing Shalwar Kameez, armed with firearm weapons made a lurking tress in their house. The accused also gave beatings to inmates and on gun point conducted a search of the house. The accused after getting safe Almirah opened, took away three pairs of gold ear rings, six gold rings, four bangles/karreys, totally weighing ten tolas, cash Rs.20,000/-, 222 bore licensed rifle, & a pistol .30 bore. After hearing hue and cry, made by the complainant, Rasheed his brother, besides other neighbourers Zahid s/o Haneef, Muhammad Javed and Sarfraz son of Master Rafique reached at the spot. The accused alongwith robbed property were running away from the place of occurrence. They were being chased by the complainant party. They made straight firing on the complainant party hitting on the chest of Muhammad Javaid, who after receiving injury fell down and succumbed at the spot. One Sarfraz also received firearm injury on his left thigh at the hands of accused. The accused while making firing fled away from the place of occurrence. Besides the complainant, the occurrence was witnessed by Sarfraz Rafique, Rasheed Ahmad and Zahid and other family members of

complainant. The complainant had asserted that accused can be identified if brought before him and the PWs."

3. After completion of investigation, report under Section 173 Cr.P.C. was submitted before the Trial Court. In order to prove its case the prosecution produced as many as 23 witnesses. In their statements recorded under Section 342 Cr.P.C, the petitioners pleaded their innocence and refuted all the allegations leveled against them. However, they did not make statements on oath under Section 340(2) Cr.P.C in disproof of allegations leveled against them. They also did not produce any defence evidence.

4. At the very outset, learned counsel for the petitioners argued that there are material contradictions and discrepancies in the statements of the prosecution witnesses, which have been overlooked by the courts below. Contends that the prosecution case is full of doubts and infirmities, as such, petitioners deserve benefit of doubt. Contends that the prosecution case is based upon conjectures 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 identification parade was conducted without observing the instructions/guidelines enunciated by the superior courts, therefore, it cannot be relied upon to sustain conviction of the petitioners. Contends that the recoveries are planted upon the petitioners, which creates a dent in the prosecution case. Contends that on the same set of evidence, co-accused Naveed has been acquitted, as such, the petitioners also deserve the same treatment to be meted out. Contends that nowhere in the evidence, it came out that as to which petitioner's fire hit the deceased, therefore, all the petitioners cannot be saddled with the criminal liability of committing murder. Lastly contends that the reasons given by the learned High Court to sustain conviction of the petitioners are speculative and artificial in nature, therefore, the impugned judgment may be set aside.

5. On the other hand, learned Law Officer assisted by the learned counsel for the complainant has defended the impugned

judgment. It was contended that the prosecution case is free from doubts and all PWs have supported the case of prosecution and there are no material contradictions in their evidence. It was further contended that the eyewitnesses were subjected to lengthy cross-examination but their evidence remained unshaken. Lastly contended that the prosecution has succeeded to prove its case beyond any shadow of doubt, therefore, the petitioners do not deserve any leniency from this Court.

6. We have heard learned counsel for the parties at a considerable length and have perused the evidence available on record.

7. It is cardinal principle of criminal jurisprudence that each case has its own facts and circumstances and that is to be decided keeping in view the peculiar facts and circumstances spelled out from the facts surfaced on the record. The instant case is the glaring example of highhandedness shown by the accused persons, who trespassed in the house of the complainant in between the night of 23/24 October, 2011 at about 01:30 am. The complainant Fazal Mehmood (PW-1) along with his family members was asleep in his house. There was sufficient light in the shape of electric bulb, which was 'on' in the courtyard. In the meanwhile, 9/10 persons armed with firearms entered into the house. They forcibly woke up the inmates while giving beating to them. They also forcibly conducted search of the house on gun point and took away different gold ornaments weighing ten tolas, cash Rs. 20,000/-, 222 bore licensed rifle and a pistol .30 bore. After commission of the offence when the accused persons were leaving the premises of the complainant, on alarm raised by the complainant and the family, Rasheed, brother of the complainant, and other neighbourers Zahid, Muhammad Javed and Sarfraz reached at the spot. They started chasing the accused persons who had trespassed into the house of the complainant and had committed dacoity. While retreating when the accused persons were being chased by the complainant party, they started firing on them. As a consequence, a fire shot hit on the chest of Muhammad Javed, who succumbed to the injuries at the spot whereas one Sarfraz also sustained injuries on his left thigh.

The matter was reported to the Police and the formal FIR was registered on 04:15 am on the same day. In the crime report, the names of the accused were not mentioned obviously for the reason that they were not known to the complainant party. However, their features were specifically given in the crime report. The perusal of record shows that the petitioners were arrested in some other cases on 15.12.2011 and 01.03.2012 and then they were formally arrested in the present case. The prosecution advanced its case mainly upon **(i)** ocular account, **(ii)** identification parade, **(iii)** medical evidence, and **(iv)** recoveries. The ocular account has been furnished by Fazal Mehmood, complainant (PW-1), Zahid Hussain (PW-2), Sarfraz, injured (PW-3) and Mazhar Mehmood (PW-4). All these witnesses of the ocular account remained consistent on each and every material point qua the date, time, mode, manner of the occurrence and the locale of the injuries on the person of the deceased and the injured PW. Sarfraz (PW-3) had sustained injuries during the occurrence, which have fully been supported by the medical evidence given by Dr. Muhammad Tariq, who appeared as PW-8. The testimony of this injured PW as well as the stamp of injuries on his person clearly proves his presence at the place of occurrence. These PWs remained consistent on each and every material point inasmuch as they made deposition according to the circumstances surfaced in this case, therefore, it can safely be concluded that the ocular account furnished by the prosecution is reliable, straightforward and confidence inspiring. These PWs were subjected to lengthy cross-examination but their testimonies could not be shattered. 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 she could not point out any major contradiction, which could shatter the case of the prosecution. In this regard, it must be kept in mind that the discrepancies have to be distinguished from contradictions. The contradiction in the statement of a witness may be fatal for the prosecution case but minor discrepancy in evidence will not make the prosecution case doubtful. Where discrepancies are of minor character and do not go to the root of the

prosecution story and do not shake the salient features of the prosecution version, they need not be given much importance.

8. The identification parade of the petitioners was held on 23.11.2011 and 06.03.2012 in District Jail Sialkot. The same was conducted by Muhammad Rashid Phularwan, Magistrate Section 30, Lahore, who appeared as PW-18. The said Judicial Magistrate categorically stated that the proceedings of the identification of each of the petitioner were conducted separately and the complainant and other PWs Zahid and Mazahar were separately summoned and they separately identified the petitioners. The petitioners were lined up with ten dummies of same stature and every time the witnesses were separately called for identification, the place of accused was changed. The said Judicial Magistrate further stated that the witnesses identified the accused in unambiguous terms and after completion of identification parade, he prepared the report and signed the same. The above-said witnesses and Muhammad Rashid Phularwan, Judicial Magistrate (PW-18) were subjected to lengthy cross-examination by the defence but they remained consistent on all material particulars of the prosecution case and their testimony could not be shattered. Nothing was suggested to PWs in their cross-examination that they deposed falsely on account of some enmity with the petitioners. The petitioners remained in the house of the complainant for a considerable length of time to complete their nefarious designs and the complainant had close proximity to remember them which enabled him to identify them later. So far as the argument of the learned counsel for the petitioners that the identification parade was conducted without observing the guidelines enunciated by the superior courts is concerned, suffice it is to state that the process of identification parade has to be carried out having regard to the exigencies of each case in a fair and non-collusive manner and such exercise is not an unchangeable ritual, inconsequential non-performance whereof, may result into failure of prosecution case, which otherwise is structured upon clean and probable evidence. Reliance is placed on Tasar Mehmood Vs. The State (2020 SCMR 1013). Even otherwise, it is settled law that holding

of identification parade is merely a corroborative piece of evidence. If a witness identifies the accused in court and his statement inspires confidence; he remains consistent on all material particulars and there is nothing in evidence to suggest that he is deposing falsely, then even the non-holding of identification parade would not be fatal for the prosecution case. Reliance is placed on Ghazanfar Ali Vs. The State (2012 SCMR 215) & Muhammad Ali Vs. The State (2022 SCMR 2024). The medical evidence available on the record further corroborates the ocular account so far as the nature, time, locale and impact of the injuries on the person of the deceased and injured is concerned. Although, it is the case of the prosecution that after their arrest, the petitioners led to the recoveries of some of the looted articles but the sole witness of the recovery proceedings i.e. Muhammad Nadeem (PW-17) has stated that his signatures were obtained on blank papers and articles were shown to him in the police station. The petitioners also got recovered the weapons, which they were carrying while committing the crime, but as no empty was sent to the office of Forensic Science Laboratory, therefore, all these recoveries are inconsequential. However, this does not mean that the petitioners are absolved of their criminal liability. There is sufficient evidence in the shape of ocular account, identification parade and medical evidence to sustain the conviction of the petitioners. During Police investigation, the accusation leveled against the petitioners was also found to be true.

9. During the course of arguments, learned counsel for the petitioners had argued that nowhere in the evidence, it came out that as to which petitioner's fire hit the deceased, therefore, all the petitioners cannot be saddled with the criminal liability. However, we do not tend to agree with the learned counsel. To appreciate the aforesaid submission, it would be in order to reproduce the relevant provisions of law, which read as under:

> "**390. Robbery**.--In all robbery there is either theft or extortion.
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> **When theft is robbery**.--Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting

to carry away property obtained by the theft, the offender, for that end voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

When extortion is robbery.--Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation.--The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

391. Dacoity: When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

395. Punishment for dacoity: Whoever commits dacoity shall be punished with imprisonment for life, or with rigorous imprisonment for a term which shall not be less than four years nor more than ten years and shall also be liable to fine.

396. Dacoity with murder: If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, everyone of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which shall not be less than four years nor more than ten years, and shall also be liable to fine."

10. On bare reading of the aforesaid provisions, it is manifestly clear that the 'dacoity' can be said to be an exaggerated version of robbery. If five or more persons conjointly commit or attempt to commit robbery it can be said to be committing the 'dacoity'. Therefore, the only difference between the 'robbery' and the 'dacoity' would be the number of persons involved in conjointly committing or attempt to commit a 'robbery'. The punishment for 'dacoity' and 'robbery' would be the same except that in the case of 'dacoity' the punishment of imprisonment for life can be awarded. However, in the case of 'dacoity with murder' the punishment of death has also been provided in the statute. An immediate feature of Sections 391 & 396 PPC which strikes at first reading is that the word "conjointly" has been used in these provisions of law, which is not

used anywhere in Pakistan Penal Code except in the afore-said provisions. It appears that this word has been deliberately preferred over the word 'jointly'. 'Conjointly' indicates jointness of action and understanding. Everyone acts in aid of other. 'Conjointly' means to act in joint manner, together, unitedly by more than one person. According to Black's Law Dictionary, 'conjoint robbery' means where the act is committed by two or more persons. 'Conjoin' means 'join together', as per the Oxford Large Print Dictionary. According to Corpus Juris Secundum, 'Conjointly is explained as 'together', the one with knowledge, consent and aid of the other and pursuant to an agreement or understanding or 'unitedly'. In the 'Words and Phrases' 'Vol. 8 A', published by 'West Publishing', same meaning is adopted as in Corpus Juris Secundum. It explains that conjoint robbery is where the act is committed by two or more persons. According to Webster's New International Dictionary 'conjoint' means 'united', 'connected', associated or to be in conjunction or carried on by two or more in combination. Similar meaning has been given in 'Collins' dictionary. Thus the use of word 'conjointly' in Sections 391/396 PPC indicates that five or more robbers act with knowledge and consent and in aid of one another or pursuant to an agreement or understanding, i.e., unitedly. No doubt in most of dacoities, the robbers would be acting with a common object to loot with use of violence. The joint reading of Sections 391 and 396 of PPC makes it abundantly clear that for the offence of dacoity, the essential pre-requisite is the joint participation of five or more persons in the commission of the offence. If in the course thereof any one of them commits murder, all members of the assembly would be guilty of dacoity with murder and would be liable to be punished as enjoin thereby. Thus, the essential pre-condition of an offence of dacoity with murder is a participating assembly of five or more persons for commission of the offence. It is not necessary that all the five persons must commit or attempt to commit robbery. If the total number of those who are committing or attempting to commit or are present and aiding such commission or attempt is at least five, all of them are guilty of dacoity. In other words, those who commit robbery and those who attempt to

commit the same, and those who are present and aiding such commission or attempt are all counted, and if their number is five or more all of them would be guilty of committing dacoity. Moreover, it is not necessary for their conviction that their attempt must succeed and even if the attempt fails even then the offence is dacoity. An immediate feature of Section 396 PPC is that it is a self-contained provision, which means that the contributory liability is independent and does not rely on any other provision of law. Section 396 PPC in its plain terms applies to every situation in which five or more persons commit dacoity and in the course of the commission of such dacoity, any one of the said persons, commits murder. All five persons, thereby become liable by statutory prescription, to the offence of dacoity with murder and expose themselves to the punishment stipulated in the said provision. The three essential ingredients for invoking Section 396 PPC are as under:-

(i) One of the persons must commit murder i.e. his act must amount to murder within the meaning of Section 300 PPC.

(ii) The said person must be one of the five or more persons who have joined together to commit dacoity.

(iii) The murder must be committed in the course of commission of such dacoity.

11. If these conditions are fulfilled, then Section 396 of PPC would come into play and blight all other persons, involved in the act of dacoity even if one of them was aware that murder was about to be committed. In other words, so far as the remaining persons are concerned, the prosecution is required to prove in order for Section 396 PPC to apply is their intention to commit dacoity. The same was the view of this Court in Muhammad Ali Vs. The State (2022 SCMR 2024).

12. So far as the argument of learned counsel for the petitioners that on the same set of evidence co-accused Naveed has been acquitted is concerned, the same is misconceived. The case of the petitioners is distinguishable to that of the acquitted co-accused. The learned Trial Court while acquitting the said co-accused has held that the name of co-accused surfacd on 01.11.2012 through supplementary statement after more than

one year of the occurrence wherein the complainant simply stated that he identified the accused in a court present at Shakargarh. However, he did not give the source of identification. Identification parade qua the said co-accused has no value in the eye of law as this accused had already been named by the complainant. It was the version of the said co-accused that he is relative of the present petitioners and used to pursue their case, therefore, he has been falsely roped in this case after one year of the occurrence. The said findings of the learned Trial Court are neither arbitrary nor capricious and the same are based upon correct appraisal of the evidence available on the record.

13. For what has been discussed above, we are of the view that the impugned judgment is well reasoned, proceeds on correct principles of law enunciated by this Court and the same does not call for any interference by this Court. Consequently, these petitions having no merit are accordingly dismissed and leave to appeal is refused.

JUDGE

JUDGE

JUDGE

Islamabad, the
2nd of March, 2023
Approved For Reporting
Khurram