

[Supreme Court of Pakistan]

Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Yahya Afridi, JJ**MUHAMMAD ARIF---Appellant****Versus****The STATE---Respondent**

Criminal Appeal No. 177-L of 2013, decided on 7th March, 2019.

(On appeal against the judgment dated 12.03.2010 passed by the learned Lahore High Court, Lahore in Crl. A. No. 1530 of 2010 and Murder Reference No. 647 of 2004)

(a) Penal Code (XLV of 1860)---

---Ss. 302(b), 324 & 337-A(ii)---Qatl-i-amd, attempt to commit qatl-i-amd, shajjah-i-khafifah--- Reappraisal of evidence---Accused and his co-accused persons were alleged to have murdered the deceased and caused injuries to certain other persons---Trial Court convicted and sentenced the accused to death--- High Court maintained conviction of accused but reduced his sentence to imprisonment for life---Held, that vehicle of the complainant's side was assaulted allegedly by the accused and three others at about 05:30 a.m. and the crime was reported to the police at 05:45 a.m. i.e. within fifteen minutes---Such circumstance showed that crime was not reported to the police at the time mentioned in the FIR, which made the prosecution case doubtful in nature from its inception---Ocular account was furnished by two witnesses, who made material improvements to their statements while appearing before the Trial Court---Moreover one of the co-accused who was attributed a firearm injury on the person of injured witness was acquitted by the High Court---Ocular account was not fully supported by the medical evidence because in the FIR as well as before the Trial Court only one injury on the person of deceased was attributed to the accused, however, in the post mortem examination report two firearm injuries were observed---No explanation whatsoever was given as to how the second injury was inflicted on the person of deceased---Recovery of the weapons of offence along with live bullets allegedly effected at the instance of the accused was not of much help to the prosecution because report of the Forensic Science Laboratory was simply to the effect that the rifle was in working order---Prosecution claimed that the accused and his accomplices reached at the place of occurrence in a car, chased the car of the complainant's side and decamped from the place of occurrence in the same car---In the FIR, model, make or registration number of the car was not disclosed-- -In order to prove abscondance of the accused for a period of three months and ten days the prosecution produced a police official who stated during his cross-examination that the address given in the warrants of arrest did not specify street, house number and other conspicuous place, and that the report on the warrants of arrest did not contain name of any person from the neighborhood or any respectable person of the locality---No corroboration could be sought from such absconcion which, even otherwise, was only for a period of three months and ten days---Conviction and sentence recorded against the accused by the courts below were set aside and accused was acquitted of the charges framed against him---Appeal was allowed accordingly.

(b) Penal Code (XLV of 1860)---

---S. 302(b)--- Qatl-i-amd--- Reappraisal of evidence---Improvement made by witness in his previous statement---Effect---When a witness improved his statement dishonestly to strengthen the prosecution case, such portion of his statement was to be discarded---Testimony of such witness could not be safely relied upon to maintain conviction and sentence of an accused on a capital charge. [p. 636] C

Mazhar Sher Awan, Additional P.G. Punjab for the State.

Date of hearing: 7th March, 2019.

JUDGMENT

MANZOOR AHMAD MALIK, J.---Muhammad Arif (appellant) along with his co-accused namely Muhammad Javaid and Babar Irfan faced trial before a learned Additional Sessions Judge Faisalabad in case FIR No.336/2002 dated 01.08.2002 offence under sections 302, 324, 427 and 34, P.P.C. registered at Police Station Gulberg, Faisalabad. After regular trial, he was convicted under section 302(b), P.P.C. and sentenced to death. He was also directed to pay Rs.1,00,000/- (rupees one hundred thousand only) as compensation to the legal heirs of the deceased. He was also convicted under section 324, P.P.C. and sentenced to rigorous imprisonment for ten years with fine of Rs.50,000/-. In default of fine the appellant had to undergo simple imprisonment of six months. Co-accused of the appellant namely Muhammad Javaid was also convicted under section 302(b), P.P.C. and sentenced to imprisonment for life. He was also directed to pay Rs.1,00,000/- (rupees one hundred thousand only) as compensation to the legal heirs of the deceased. In default of payment of compensation amount he had to further undergo simple imprisonment for six months. He was also convicted under section 324, P.P.C. and sentenced ten years imprisonment with fine of Rs.50,000/-. In default of payment of fine he had to undergo simple imprisonment of six months. Muhammad Arif (appellant) and his co-accused Muhammad Javaid were also convicted under section 337-A(i), P.P.C. and sentenced to two years' R.I. and Daman of Rs.10,000/- (rupees ten thousand only) each. The substantive sentences were ordered to run concurrently and benefit of section 382-B, Code of Criminal Procedure was extended to both of them. Through the same judgment, Baber Arfan, co-accused of the appellant was acquitted of the charge. Aggrieved of their conviction and sentence Muhammad Arif (appellant) and his co-convict Muhammad Javaid filed Criminal Appeal No.1530 of 2004 whereas the learned trial court transmitted Murder Reference No.647 of 2004 for confirmation or otherwise of the sentence of death awarded to Muhammad Arif (appellant). Both these matters were taken up together by the learned appellate court. A learned Division Bench of the Lahore High Court through impugned judgment dated 12.03.2010 allowed the appeal to the extent of Muhammad Javaid and he was acquitted of the charges framed against him. To the extent of Muhammad Arif (appellant) the appeal was dismissed, however, his death sentenced was converted into imprisonment for life. It was observed by the learned appellate court that Muhammad Arif (appellant) shall pay the compensation on the same terms and conditions as ordained by the learned trial court. Feeling dissatisfied with the verdict of the learned appellate court Muhammad Arif preferred Jail Petition No.569/2010 wherein leave was granted vide order dated 21.02.2013 to consider whether the conclusions reached by the Lahore High Court, Lahore out to have resulted in the petitioner's acquittal or not. Hence this appeal with the leave of the Court. Before proceeding further in the matter, it is pertinent to note here that through the same order, Criminal Petition No.977-L of 2010 filed by Hamid Hussain complainant was dismissed and leave to appeal to that extent was refused.

2. Brief facts of the case as divulged from the complaint (Ex:PT) and (FIR Ex:PT/1) are that the complainant along with his father and brother were going towards his business on 01.08.2002 at about 05:30 a.m. early in the morning. When their car reached near the graveyard, Muhammad Arif (appellant) and Muhammad Javaid (co-accused of the appellant since acquitted by the learned appellate court) along with two other unknown persons armed with deadly weapons were available in another car without any registration number. When the car of complainant's side reached near the car of the appellant's side, Muhammad Arif (appellant) started firing with his rifle. One of the bullets hit the back side of neck of Javaid Hussain, father of the complainant. Then all the assailants made indiscriminate firing. It was further alleged in the FIR by

the complainant that Muhammad Javaid fired with his pump action which hit the brother of the complainant namely Aamer Javed on the left side of his head. The motive behind the occurrence as stated in the FIR was to the effect that father of Muhammad Arif (appellant) was murdered, and in that, father of the complainant was implicated but subsequently acquitted. Due to that grudge, Muhammad Arif (appellant) etc attempted to murder Javaid Hussain (deceased) about six years back. In that case Muhammad Arif (appellant) was a proclaimed offender whereas father of Muhammad Javaid had been convicted and sentenced to three years' rigorous imprisonment. Due to this grudge an assault was made upon the complainant's side.

3. We have heard learned counsel for the appellant, learned Additional Prosecutor General Punjab for the State and with their able assistance have also gone through the relevant record.

4. Car of the complainant's side was assaulted allegedly by Muhammad Arif and three others on 01.08.2002 at about 05:30 a.m. and the crime was reported to the Police at 05:45 a.m. i.e. within fifteen minutes. This over promptitude shown by the complainant as well as the Police was exposed by the defence. Dr Muhammad Akram (PW.11) stated during his examination in chief that he had examined Javaid Hussain (deceased) in injured condition at 05:50 a.m. He further stated that he had medically examined Aamar Javaid injured at 06:15 a.m. Zafar Iqbal 2656/HC (PW.16) who had formally recorded the FIR was cross-examined on this aspect of the case. After perusing entry No.25 in register No.2 he narrated that he had written therein that an application along with MLR No.23950 had been received on behalf of Hamid Hussain complainant. He further stated that the application was with medical certificate. He went on to state that FIR and rapt were simultaneously written down. He further clarified the situation by stating that, firstly, he had written rapat and then the FIR was lodged. This part of the cross-examination of Zafar Iqbal (PW.6) when juxtaposed with statement of Dr. Muhammad Akram (PW.11) clearly suggests that the crime was not reported to the Police at the time mentioned in the FIR, which makes the prosecution case doubtful in nature from its inception.

6. Ocular account was furnished by Hamad Hussain complainant (PW.9) and Aamar Javaid injured (PW.10). Both these witnesses while appearing before the learned trial court made material improvements. They were confronted with their statements recorded by the Police and the improvements were brought on record. Relevant extract from the cross-examination of the complainant is reproduced hereunder:-

"I did not record in my statement before the police that Akbar PW is my Mamoon and Arif, Javaid and Babar accused are relatives inter se. I stated before the police that I was travelling with my father in the car TOYOTA COROLLA FDU25. Confronted with Exh.PT only car has been mentioned sans any number or make. I had got recorded in my statement under section 154 of Cr.P.C. that I was driving the car, while my father was sitting in the front seat and my brother Aamar Javaid was sitting in the rear seat behind the deceased. Confronted with Exh.PT where not so recorded. I do not remember as to whether I have mentioned in statement about Alto car without bearing registration number. Confronted with Exh.PT the word Alto is not recorded. I have narrated in my statement Exh.PT that Javaid son of Bashir was armed with pump action .12 bore. Confronted with Exh.PT where armed with .12 bore is not mentioned. Volunteered that rifle was got recorded as a mistake, which was subsequently corrected in the same statement. It is incorrect that my volunteered statement is false. It is incorrect that just to make my statement true, I am deliberately converted the word rifle into .12 bore pump action. I did not mention in my statement Exh.PT that two unidentified people were armed with .222 bore rifle and .12 bore gun. I had got recorded that Arif opened the fire with 222 rifle which hit my father on the back side of neck. Confronted with Exh.PT the word "222"-is not mentioned. It is true that I have got recorded that Arif started firing with his rifle as soon as he saw our car. It is incorrect that I have improved my statement with mala fide intention

as tutored to me in order to bring it in line with medical evidence. I have mentioned that Javaid opened fire with his pump action gun. I did not mention in my complaint Exh.PT that we were medically(sic.) and medical certificates were issued. Confronted with Exh.PT only going to hospital is mentioned. I did not mention about pendency of any appeal of father of accused Javaid. I did not specifically mention that my father remained unconscious as a result of injuries sustained by firearm, made by the accused. I did not make any statement to the Police in respect of my statement in chief that on 8.8.2002 besides me PW Akbar and Aamar Javaid were present on the place of occurrence when Aurang Zaib Draftsman inspected the same and prepared scaled site plan. I did not make statement before the police that Magistrate had got recorded my statement on 23.11.2002. It is incorrect that I have deliberately improved my statement as tutored to me."

Following improvements were brought on record through cross-examination of Aamer Javaid injured PW.10:-

"My statement was recorded by the police. I did not state before the police that I was running a commission shop.

However, I have stated that when we reached graveyard chowk, an Alto car without registration number was parked there. Confronted with Exh.DA, make of the car Alto is not mentioned. I had got recorded that Arif was armed with 222, Babar Irfan who was identified by me later on in the jail was armed with 222 and Javaid was armed with 12 bore pump action. Confronted with DA, the 222 and 12 bore are not recorded. I had also stated that Arif fired at my father, which hit him on the back side of his neck. Confronted with Exh.DA where

is recorded. I also stated that Javaid made a fire with his weapon which after pearcing through window pane hit on my left side of head and a pellet of the same is still available in my head. Confronted with Exh.DA not recorded in same dictation. I had also stated that one fire hit the door and upper part of the door (Gola of door). Confronted with Exh.DA word "Gola" is not recorded."

It is well established by now that when a witness improves his statement and moment it is observed that the said improvement was made dishonestly to strengthen the prosecution, such portion of his statement is to be discarded out of consideration. Having observed the improvements in the statements of both the witnesses of ocular account, we hold that it is not safe to rely on their testimony to maintain conviction and sentence of Muhammad Arif (appellant) on a capital charge. Moreover, Muhammad Javaid co-accused of the appellant who was attributed a firearm injury on the person of Aamer Javaid injured (PW.10) was acquitted by the learned appellate court. Criminal Petition filed by the complainant challenging his acquittal was dismissed, therefore, if testimony of Aamer Javaid was not believed to the extent of the injuries on his person, the same deserves to be discarded out of consideration to the extent of the role assigned to Muhammad Arif (appellant).

6. The ocular account is not fully supported by the medical because in the FIR as well as before the learned trial court only one injury on the person of Javaid Hussain (deceased) was attributed to Muhammad Arif (appellant). Even as per MLC of Javaid Hussain issued in his favour by Dr. Muhammad Akram (PW11), who medically examined him, there was only one entry wound on the person of deceased. During his cross-

examination, he (PW11) stated that he did not observe any other injury on the person of deceased. Dr. Iftikhar Ahmad (PW2) conducted postmortem examination on the dead body of deceased Javaid Hussain. He (PW2) stated in his cross-examination stated that there was only one injury in the MLC; that it was only the entry wound and that no exit wound was observed. However, in the post-mortem examination report two firearm injuries (injury No.1 4 cm x 2 cm and injury No.1 cm x 1/2 cm) were observed. There is no explanation whatsoever as to how the second injury was inflicted on the person of Javaid Hussain (deceased).

7. Recovery of the weapons of offence along with live bullets allegedly effected at the instance of the appellant is not of much help to the prosecution because report of the Forensic Science Laboratory (Exh.PHH) is simply to the effect that rifle 222 bore was in working order.

8. It is case of the prosecution that the appellant and his accomplices reached at the place of occurrence in a car, chased the car of the complainant's side and decamped from the place of occurrence in the same car. In the FIR, model, make or registration number of the car was not disclosed. It was claimed by prosecution witnesses that they had identified an Alto car in the warehouse of bank and the same was taken into possession but the said recovery was not effected upon the disclosure or pointation of the present appellant. Babar Irfan on whose disclosure the said car was taken into possession was acquitted by the learned trial court and his acquittal was not assailed any further either by the complainant or by the State, therefore, the said recovery cannot be used against the appellant.

9. The occurrence took place on 01.08.2002. Muhammad Akram S.I. arrested Muhammad Arif (appellant) whereas Muhammad Arif (appellant) was arrested by Abdul Rauf S.I. (PW.17) on 11.11.2002. In order to prove abscondance of the appellant for a period of three months and ten days the prosecution produced Muhammad Irshad 4106/C (PW.3) who stated during his cross-examination that the address given in the warrants of arrest did not specify street, house number and other conspicuous place. He further stated that the report on the warrants of arrest did not contain name of any person from the neighbourhood or any respectable person of the locality. He further stated that the report on the warrants of arrest and proclamation were bereft of any evidence. Therefore, no corroboration can be sought from such absconcion which, even otherwise, is only for a period of three months and ten days.

10. Having gone through the evidence produced by the prosecution, we have also gone through the impugned judgment of the learned Lahore High Court. Case of the present appellant has been discussed in paras 18 and 19, which read as under:-

"As far as the case of Muhammad Arif is concerned, admittedly the occurrence in this case had taken place at 5:30 a.m. on 1.8.2002. The time of occurrence is certainly of odd hours and presence of independent witness at the relevant time and place is out of question. The manner of occurrence in this case is highly criminal as far as the prosecution case is concerned. The prosecution has not brought quality evidence to persuade us to reach the conclusion that whatever the prosecution witnesses had stated is natural and inspire confidence. As per the contents of FIR 4 persons with sophisticated weapon resorted to indiscriminate firing at a place where there was no scope of interception or retaliation and nothing was recovered in the shape of crime empty from the place of occurrence. It is the prosecution case that the appellants also chased them when they accelerated their vehicle to escape from the place of occurrence but in such trial not a single empty was recovered. We are conscious of the fact that although the deceased and other persons present in the vehicle were at the mercy of the appellant but one pellet was recovered from the injury of prosecution witness, which was declared being superficial by the Doctor. The injury ascribed to the deceased though was caused by fire arm, but nothing in the shape of pellet or bullet was recovered from there except a Led

bullet, which was found lying in the car, was sent to the office of Forensic Science Laboratory, but of not avail to the prosecution. This version of the prosecution that the deceased sustained only one injury on the back of neck is contradicted by the Doctor, who conducted the post mortem examination (PW2), who gave his opinion that there are two injuries on the person of the deceased, for which the ocular account is silent. According to the contents of the FIR, appellant Arif was armed with rifle but recovery of rifle from the possession of Arif appellant is also not of much importance because no empty of rifle was recovered from the place of occurrence. Recovery of Led Bullet from the Car FDU 25 belonging to the complainant party do not advance prosecution case because the report of Forensic Science Laboratory does not coincide with the prosecution case. We also cannot loose sight of the fact that the fact that the deceased of this case Javaid Hassain sustained on 1.8.2002, while he succumbed to the injuries after 7 days of the occurrence i.e. on 7.8.2002 after the lapse of 7 days of the occurrence i.e. 7.8.2002 after the lapse of 7 days and according to the report of Doctor PW-11 the death in this case had occurred due to cardio respiratory arrest, which could not direct affect of the injury caused. If so, then the injury caused to the deceased by the appellant had not contributed towards his death, rather it could be due to slackness of the Doctor or so many other medical complications, which are not brought on the record. Previous enmity between the parties is admitted that there was cordial relations between the parties since many years, if so, the prosecution is silent on the immediate motive to commit the crime in hand.

19. What has been stated above, we cannot escape from the fact that the deceased had already 60 criminal cases to his credit, which shows his desperate character. In such like situation the judgment referred by the learned counsel for the appellant of the august Supreme Court report above, lends guidance to us, therefore, following the judgment reported above, we consider it a mitigating circumstance in favour of the appellant. Therefore, following the principle of abundant caution we do not find any independent corroboration qua the case of Arif appellant keeping in view the admitted enmity between the parties and non-mentioning of source of at the relevant time..."

11. As a sequel of the reappraisal of evidence in paras 4 to 9 and particularly the observations recorded by the learned appellate court in the impugned judgment there was no justification for the learned appellate court to award imprisonment for life and it was an open and shut case of acquittal. Therefore, the appeal in hand is allowed. Conviction and sentence recorded against the appellant by the learned courts below are set aside and appellant Muhammad Arif is acquitted of the charges framed against him. He is in jail and ordered to be released forthwith if not required to be detained any other case.

MWA/M-11/SC Appeal allowed.