

**SHARIAT APPELLATE BENCH OF HIGH COURT OF AZAD  
JAMMU AND KASHMIR**

Crim. Appeal No.20/2017;  
Date of inst. 01.11.2017;  
Date of hearing. 06.07.2022;  
Date of decision. 03.08.2022.

Muhammad Banaras S/o Farzand Ali, caste Mughal R/o Sangal  
village Narakot Tehsil Charhoi District Kotli.

.....Appellant

**VERSUS**

1. The State through Advocate General of Azad Jammu  
and Kashmir, Muzaffarabad;
2. Muhammad Liaqat S/o Muhammad Sharif, caste  
Mughal R/o Sangal village Narakot Tehsil Charhoi  
District Kotli.

..... Respondents

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Reference No. 21/2017;  
Date of Inst. 01.11.2017.

The State through Muhammad Liaqat S/o Muhammad Sharif,  
caste Mughal, R/o Narakot, Tehsil Charhoi District Kotli.

...Complainant

**VERSUS**

Muhammad Banaras S/o Farzad Ali, caste Mughal R/o Sangal  
Narakot Tehsil Charhoi District Kotli.

....Respondents

**MURDER APPEAL AND REFERENCE**

***Before:— Justice Muhammad Ejaz Khan, J.  
Justice Chaudhary Khalid Rasheed, J.***

**PRESENT:**

Raja Masood Ahmed Khan, Advocate, for the appellant.

Chaudhary Muhammad Ajaib Khan, Advocate, for the complainant.  
AAG for the State.

**JUDGMENT:**

(Chaudhary Khalid Rasheed, J.), The captioned appeal has been filed against the judgment dated 04.10.2016, whereby, appellant Muhammad Banaras has been convicted by sending reference for confirmation of death sentence awarded to convict Muhammad Banaras.

Facts giving rise to the instant appeal are, Muhammad Liaqat S/o Muhammad Sharif filed a written application Exh.PB at Police Station Charhoi on 18.06.2004, wherein, it was stated that on 18.06.2004 at about 1:15 A.M, the complainant along with his inmates was sleeping in the courtyard of their residential house, in the meantime, Muhammad Banaras with an unknown person entered into his courtyard with the intention of theft and when he flashed torch, the complainant and his wife Mst. Nasreen woke up. The complainant with the help of torch saw, Muhammad Banaras who was armed with a 30 bore pistol and was accompanied with another person to whom he did not know who was also armed with a 30 bore pistol. The complainant raised his voice and called his brother Muhammad Ayoub to come out as some persons have forcibly entered into their house, whereupon Muhammad Ayoub came out of his house and when accused

persons tried to flee away his brother Ayoub attempted to catch them, the unknown person with an intention of murder, fired with 30 bore pistol but it was missed, then accused Muhammad Banaras fired straight shot with 30 bore pistol by targeting Ayoub which hit him at the inner side of his left hip who fell down. On hue and cry, father of complainant Muhammad Sharif, Riasat and other inhabitants of the village reached at the spot who also saw the incident and accused persons in the light of their torch while they were fleeing away. Injured Ayoub, succumbed to his injury on the way to police Chowki and expired. On this report, F.I.R. No.106/2004 was registered at Police Station Khoiratta in the offences under sections 302/458 and 34-APC on 18.06.2004. During investigation sections 324, 109-APC and 13/20/65 Arms Act were inserted. On completion of investigation, police submitted challan before the trial Court to the extent of co-accused Sheraz Akram and Itfaq on 04.08.2004 and accused Banaras was proceeded under section 512 Cr.P.C. On arrest of accused Banaras, his statement under section 265-D Cr.P.C. was recorded on 22.03.2011. The accused pleaded innocence, hence, the prosecution was directed to lead evidence in order to prove the guilt of the accused. At the completion of prosecution evidence, the statement of accused under section 342 Cr.P.C. was recorded on 17.09.2015 who again claimed

innocence however failed to produce evidence in defence and got recorded his statement under section 340(2) Cr.P.C. on 14.12.2015. At the conclusion of the trial the learned court below heard arguments pro and contra and convicted the accused under section 17(4) EHA and awarded him death sentence as Hadd and order to pay Rs.10,00,000/- as compensation to the legal heirs of deceased under section 544-A Cr.P.C. He was further sentenced to ten years rigorous imprisonment and Rs.10,000/- as fine under section 458 APC. The accused was also convicted under section 13/20/65 Arms Act and was awarded three years imprisonment and Rs.20,000/- fine. Benefit of section 382(B) was extended in his favour vide its impugned judgment dated 04.10.2016, hence, the captioned appeal as well as reference.

The learned counsel for the appellant zealously argued that accused has not committed alleged offence and has been involved in the case with mala fide intention. The learned Advocate further argued that appellant lives in Pakistan and on the day of occurrence he was not present in the territory of Azad Kashmir. It was also solicited that there are enormous contradictions in the statements of prosecution witnesses, which create serious doubts, hence, accused was liable to be extended the benefit of doubt. The learned Advocate while referring to the statements of the prosecution witnesses stated

that Riasat and Sharif, the prosecution witnesses who have been cited as eye witnesses of the occurrence reached on spot on hearing firing, hence they are not eye witnesses of the occurrence. The learned Advocate further proceeded that it is a celebrated precept of law that benefit of slightest doubt has to be resolved in favour of the accused and in the instant case, the prosecution story consists of major contradictions regarding time and manner of occurrence, thus, appellant was liable to be acquitted of the charges as a matter of right and not as grace but the Court below has failed to appreciate the relevant evidence and convicted accused persons on the foundation of contradictory statements, hence the impugned judgment entails to be set-at-naught.

The learned counsel for the complainant strenuously argued that accused person was nominated in the promptly lodged F.I.R. and occurrence has been proved through reliable and tangible evidence of eye witnesses. The learned Advocate further argued that eye witnesses of the occurrence were very well familiar to accused Muhammad Banaras, as resident of neighbouring vicinity therefore, it could not be expected that they failed to identify him. The learned Advocate further solicited that prosecution witnesses are natural, trustworthy and confidence inspiring hence their evidence deserves to be accepted and relied upon. The learned

Advocate defended the impugned judgment and prayed that the appeal filed by convict-appellant entails to be sent away.

He placed reliance on the following case laws:-

1. 2010 SCR 113;
2. PLD 2010 Supreme Court 642;
3. 2007 P Cr.L J 1173 Shariat Court (AJ&K);
4. PLJ 2006 Sh.C. (AJK) 1;
5. PLJ 2007 SC (AJ&K) 97;
6. 2009 SCR 71;
7. 1998 SCR 337;
8. 2008 YLR 2910 (Karachi);
9. 2008 YLR 1453 (Lahore);
10. PLJ 1984 Cr. C (AJK) 167;
11. 2007 SCR 1.

We have heard the learned counsel for the parties and gone through the record of the case with utmost care and caution.

A perusal of the record reveals that occurrence was stated to be taken place at about 1:15 A.M. and report of the incident was lodged at Police Station Charhoi at 3:30 A.M. hence, F.I.R. was lodged in a promptitude manner and accused was nominated thus from any stretch of imagination it could not be presumed that accused was involved in the case with malicious intention or F.I.R. was an outcome of afterthought, concocted or fabricated. In F.I.R., it has been clearly illuminated that complainant, his wife Mst. Nasreen, Muhammad Sharif, Riasat and other inhabitants of the vicinity reached at the scene of occurrence and identified accused Banaras with the help of torch while he was fleeing away. The

complainant who was also an eye witness of the occurrence also appeared before the Court and got recorded his statement on 21.10.2004, wherein he reiterated the story narrated in F.I.R. and categorically indicated that accused Banaras fired with 30 bore pistol at his brother Muhammad Ayoub which hit him at the inner side of his left hip. The statement of complainant Muhammad Liaqat was again recorded on 16.05.2011 as at the time of his first statement accused Muhammad Banaras was absconder. In his statement he supported the story narrated in F.I.R. by endorsing his earlier Court statement and learned counsel for accused person during his detailed cross-examination failed to shake his credibility or cause any considerable dent in the prosecution version.

Mst. Nasreen Akhtar wife of the complainant who was also an eye witness of occurrence got recorded her statement on 16.07.2005 and thereafter, her statement was recorded second time on 17.10.2011. She amply supported prosecution version and submitted that they have identified accused Muhammad Banaras who was standing in their courtyard. She further deposed that the shot fired by the said accused hit deceased Ayoub at his hip. The learned counsel for the defence also failed to impeach credibility of her statement

and remained unsuccessful to destabilize or divert her statement.

The prosecution witness Muhammad Riasat also got his statement recorded on 18.08.2011 and stated that on hearing the noise of fire he reached on the spot and identified accused Muhammad Banaras. Though he deposed that on hearing the sound of fire he reached on the spot after four to five minutes and further deposed that duration between first and second fire was 3/4 minutes, hence, if it is considered that he has not seen fire shot on deceased but his statement is corroboratory to the prosecution version to the extent that he has identified accused Muhammad Banaras when he was standing in the courtyard of the house of complainant at that odd hour of night.

Muhammad Sharif father of the complainant also got his statement recorded on 05.03.2015 and deposed that on the day of occurrence he was sleeping in his house and when Liaqat called, he came to the courtyard of the house accused Muhammad Banaras directly fired after targeting Ayoub. He also identified accused Muhammad Banaras. As prosecution witness Muhammad Sharif later expired, therefore, counsel for the appellant could not cross-examine his statement but being an eye witness of the occurrence his statement is much



relevant in the light of the statement of other eye witnesses of the occurrence who proved credible during their evidence.

Tazeem, wife of deceased Muhammad Ayoub also appeared in the witness box and got her statement recorded. She also affirmed the prosecution version and remained stable and steady during cross-examination. The prosecution has proved its case by producing reliable and credible eye witnesses of the occurrence who also found as trustworthy in Tazkia-al-Shahood (purgation).

The prosecution case is further strengthened from other documentary and circumstantial evidence. As per recovery memo Exh.PK, 30 bore pistol, the weapon of offence was recovered from residential house of appellant on his pointation on 09.01.2011 in presence of Amjad Farooq and Muhammad Qayyum. The recovery witness Amjad Farooq got recorded his statement on 17.08.2013 and fully supported the recovery of weapon of offence on the instance of accused. It is also evident from the record that a crime empty of 30 bore pistol was also recovered from 11 feet near the scene of occurrence vide Exh.PG and another crime empty was recovered by the police from the place of occurrence vide Exh.PH. According to the report of FSL, the recovered crime empty from the place of occurrence was found to have been fired from 30 bore pistol recovered on the pointation of

accused Banaras which was in working condition with safety features functioning properly, thus, the recovery of weapon of offence and crime empty are corroboratory evidence of direct and reliable prosecution version and even if that report has not been tendered in evidence but can be considered as held by the Hon'ble apex Court in 2001 P.Cr.L.J S.C. (AJK) 827 and 2001 SCR 319.

As per medico legal report in shape of postmortem report is concerned, deceased has died due to a fire arm injury, hence, medical report is also in line with the prosecution version, thus, the case of the prosecution and the guilt of accused has been proved through direct evidence as well as circumstantial evidence sine any shadow of reasonable doubt.

It may be stated here that the Court below has convicted accused and awarded him death sentence under section 17(4) EHA, however, under law the Nisab of evidence under section 7(b) EHA for conviction under section 17(4) EHA is two independent eye-witnesses who have seen the occurrence, other than the victim of occurrence. In this case, only one Muhammad Riasat is an independent witness who was not the direct victim of occurrence as he admitted in his Court statement that he reached on spot after firing whereas other eye witnesses are the inmates of the complainant, hence the Nisab of Shahadat mentioned in section 7(b) EHA for

conviction under section 17(4) EHA is not available and conviction under section 20 EHA cannot be awarded in case of murder committed during robbery because statute is silent for such eventuality. However, as stated above it is proved through direct evidence as well as corroboratory evidence that accused/appellant along with co accused trespassed into the house of the complainant by arming themselves with unlicensed 30 bore pistols and fired direct shot with an intention of grievous hurt or death hence, ingredients of section 300 APC are completed because it caused death of Muhammad Ayoub, brother of the complainant, thus, the offence under section 302-APC is fully attracted, hence, accused was liable to be convicted under section 302 APC. Moreover, a long and unexplained period of absconcion of appellant is one of corroboratory evidence which is also liable to be considered, as held by Hon'ble apex Court in 2015 SCR 465.

The discrepancies pointed out by the learned counsel for the appellant in the statements of prosecution witnesses are minor in nature, which do not amount to falsify the prosecution version and none of these discrepancies is fatal for the prosecution, thus, such type of minor discrepancies in details of facts are liable to be ignored. Reliance in this regard can be placed on 2014 SCR 421.

The sum and substance of the above discussion is, the ratio decidendi recorded in the impugned verdict by the Court below is hereby upheld with the modification that beside the other sentences awarded by the trial Court, the accused has been convicted under section 302(b)-APC and is hereby awarded death sentence as Tazir but Nisab of evidence as mentioned in section 7(b) EHA for conviction under section 17(4) EHA is not available, hence, he is acquitted of the charge under said section. The reference sent by the trial Court is answered in the manner indicated above.

*Muzaffarabad;*  
03.08.2022.

*-Sd-*  
**JUDGE**

*-Sd-*  
**JUDGE**

**Approved for reporting.**

**-Sd-**  
**JUDGE**