

SHARIAT APPELLATE BENCH OF HIGH COURT OF AZAD
JAMMU AND KASHMIR

Crim. Appeal No.02/2018;
Date of inst. 21.03.2018;
Date of hearing. 05.07.2022;
Date of decision. 03.08.2022.

1. Usman S/o Amrat Ullah;
2. Inzamam-ul-Haq S/o Naseebullah, caste Rajpoot R/o No.1 Darkoti No.2 Khanpur Jagalpal Tehsil Khoiratta District Kotli.

.....Appellants

VERSUS

1. The State through Muhammad Aslam Bhatti S/o Said Muhammad, caste Bhatti R/o Darkoti Tehsil Khoiratta District Kotli.

.....Complainant

2. Muhammad Younus, father;
3. Mst. Anwer Begum, mother;
4. Mst. Asia Begum, sister;
5. Rehana Kousar, widow;
6. Moazam Gul;
7. Mukheez Gul;
8. Toheed Gul;
9. Arman Gul;
10. Arbab Gul D/o Gulfaraz S/o Muhammad Younus R/o Darkoti Tehsil Khoiratta District Kotli;
11. Additional Advocate General.

..... Respondents

Crim. Appeal No. 03/2018;
Date of Inst. 27.03.2018.

1. Muhammad Younus S/o Muhammad Aslam father of deceased;
2. Mst. Anwer Begum, mother of deceased;
3. Rehana Kousar, widow of deceased;
4. Muoazam Gul;

5. Mukheez Gul;
6. Toheed Gul, sons;
7. Arman Gul;
8. Rubab Gul D/o Gulfaraz, caste Bhatti R/o Darkot Tehsil Khoiratta District Kotli.

...Appellants

VERSUS

1. Usman S/o Amratullah, caste Rajpoot R/o Darkot;
2. Inzmam-ul-Haq S/o Naseebullah, caste Rajpoot R/o Khanpur Jagalpal;
3. Saqlain Shah S/o Syed Nazir Hussain Shah, caste Syed R/o Darkot Tehsil Khoiratta District Kotli.

.....Accused/respondents

4. The State through Additional Advocate General

...Respondents

MURDER APPEALS

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

PRESENT:

Mirza Abdul Aziz Ratalvi, Advocate, for the convict-appellants.
Chaudhary Mehboob Elahi, Advocate, for the complainant.
AAG for the State.

JUDGMENT:

(Chaudhary Khalid Rasheed, J.), The captioned appeals have been filed against the judgment dated 28.02.2018 passed by the learned District Court of Criminal Jurisdiction, Kotli, whereby, accused Usman and Inzamam-ul-Haq have been convicted whereas, accused Saqlain was acquitted of the charge by extending him benefit of doubt.

Facts giving rise to the instant appeals are, Muhammad Aslam Bhatti S/o Said Muhammad, caste Bhatti R/o Darkoti Tehsil Khoiratta District Kotli filed written application Exh.PA at Police Station Khoiratta on 09.02.2014 alleging therein that the complainant is resident of village Darkoti. It was further stated that his grandson Gulfaraz runs a shop with the name of Madni General Store at Dabar Mai Toti Sahiba and he used to come back between 9:00 to 10:00 P.M. Today, on 09.02.2014 at 9:10 P.M. his grandson Gulfaraz conveyed through a telephonic call that he was coming and dinner was asked to be prepared. The complainant was present at home, at 9:30 P.M, he heard the sound of three gun shots, as it was the time of coming of Gulfaraz, so, they rushed towards the place of firing and saw that motorbike of Gulfaraz was lying with blood stains on it. Besides the complainant and his family members, other people of locality started searching Gulfaraz and by chasing the stains of blood, when they reached near the house of Raja Zaffar, saw that Gulfaraz was lying in the pool of blood who was immediately taken to hospital however, the doctor declared him dead. It was suspected that there was a previous vendetta with Ashfaq since long, hence, he has committed the said offence. On this report, F.I.R. No.18/2014 Exh.PB was registered at Police Station Khoiratta in the offence under section 302-APC on 09.02.2014, investigation started,

during investigation, nominated accused Muhammad Ashfaq was found innocent and was discharged under section 169 Cr.P.C. but arrested accused Usman, Inzamam-ul-Haq and Saqlain as their involvement in the offence was traced, on completion of investigation, the police presented report under section 173 Cr.P.C. before the District Criminal Court on 21.04.2014 in the offences under sections 302, 341, 201, 204, 109, 34 APC and 17(4) EHA and 13/20/65 Arms Act and accused Usman, Inzamam-ul-Haq and Saqlain were sent to face the trial. The trial Court recorded statements of the accused persons under section 265-D Cr.P.C. on 21.04.2014, who pleaded innocence, whereupon the prosecution was directed to lead evidence. At the completion of prosecution evidence, the statement of accused persons were recorded under section 342 Cr.P.C. on 13.02.2018. Accused again claimed innocence, however refused to produce evidence in defence and also denied to record their statements under section 340(2) Cr.P.C. At the conclusion of trial the learned Court below convicted accused Usman and Inzamam-ul-Haq under section 302 and awarded 25/25 years rigorous imprisonment. Accused were also convicted under section 394-APC and awarded them 10/10 years rigorous imprisonment and Rs.10000/- fine each, sentenced to one month simple imprisonment under section 341 APC and two years simple imprisonment to each of them

under section 13 of the Arms Act, 1965. Appellants were also ordered to pay Rs.10,00,000/- each as compensation to the legal heirs of deceased under section 544-A Cr.P.C. but were acquitted of the charges under section 109, 201, 204-APC whereas accused Saqlain Shah was acquitted of all the charges by extending him a benefit of doubt vide its impugned judgment dated 28.02.2018, hence the captioned appeals.

The learned counsel for the convict-appellants vehemently argued that accused were not nominated in F.I.R. but have been involved during investigation by the investigating agency with mala-fide intention. The learned Advocate further argued that there is no eye witness of the occurrence and the entire prosecution case rotated around circumstantial evidence which is not confidence inspiring rather full of major contradictions which created serious doubts and dints in the prosecution story and even falsify and negated the occurrence as alleged by the prosecution. The learned counsel claimed that recoveries of the weapons of offence and alleged stolen articles are also doubtful as recovery witnesses miserably failed to support the prosecution version. The learned Advocate also stated that there are also major and considerable contradictions in the statements of prosecution witnesses regarding time and manner of occurrence. The learned Advocate also held that no

independent witness has been associated to prove the guilt of accused which was sine qua non because prosecution case entirely depends upon circumstantial evidence. The learned Advocate also contended that statements of the accused recorded under section 164 Cr.P.C. are also not reliable as the signature and thumb impression of the accused persons are fake and procedure provided by law has also not been adopted while recording such statements, hence the same are not reliable or credible. It was also stated that in case of circumstantial evidence, prosecution has to prove its case through enormously persuasive circumstances and if a single link of chain is missing the conviction could not be sustained while in the instant case, prosecution story is a bunch of uncertainties hence, accused persons are entitled to get the benefit of doubt not as grace but right, whereas, the Court below anomalously passed conviction order on the basis of unstable and contradictory evidence. The learned Advocate placed reliance on following case laws:

1. PLJ 2000 Cr.C. (Quetta) 277;
2. 2001 MLD 416 (Lahore);
3. 2015 SCR 533;
4. 2019 SCR 105;

The learned Advocate appeared on behalf of the complainant submitted that prosecution has proved its case by producing cogent, convincing, tangible and confidence

inspiring evidence therefore, accused persons were liable to be convicted major punishment under section 302-APC. The learned Advocate further solicited that the weapons of offence and stolen articles were recovered on the pointation of accused persons, therefore, the case of the prosecution is amply proved through concrete circumstantial evidence, he also stated that prosecution case is further strengthened by the statements of accused recorded under section 164 Cr.P.C. and despite any procedural defect in confessional statement, if it is found true, voluntarily and trustworthy, the judicial confession may safely be made basis for conviction of an accused and any procedural defect would not vitiate the admissibility of such statement. It was further contended that motive stated in the prosecution story that the accused persons have committed the offence to plunder and rob money is also proved and even the absence of motive is no ground for acquittal or for lesser punishment and becomes immaterial if the case of the prosecution is otherwise proved through reliable evidence. It was also claimed that when a specific plea has been taken by accused persons then they should prove it by producing evidence otherwise cannot take benefit out of it. The learned Advocate placed reliance on following case laws:

1. 2001 PCr. LJ 1968 (Lahore);
2. 2014 SCR 893;
3. PLJ 2017 Cr.C. (Lahore) 354.;

4. 2014 PCr. LJ 1036 (Peshawar);
5. PLJ 2005 Sh.C. (AJ&K) 83;
6. 2004 PCr. LJ 805 (Lahore);
7. 2008 MLD 1442 (Karachi);
8. PLJ 2005 Sh.C (AJ&K) 62;
9. PLD 1995 Supreme Court 343;
10. 2002 SCR 510;
11. 2011 SCMR 429;
12. 2010 SCMR 1772;
13. 2002 PCr. LJ 1965 (Lahore);
14. 2014 SCR 1585;
15. PLJ 2017 Sh.C. (AJ&K) 44;
16. 2008 YLR 508;

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

In this case, initially, F.I.R. was registered in offence under section 302-APC on the application of complainant Muhammad Aslam Bhatti and during investigation, prosecution set up the case in the manner that on 09.02.2014, accused Muhammad Usman, Inzam-ul-Haq and Saqlain prepared a plan to rob deceased Gulfaraz who was a businessman and to achieve their goal, accused Muhammad Usman and Inzamam who were armed with 30 bore pistols waylaid deceased Gul Faraz and sent accused Saqlain to Darbar Mai Toti Bazar and directed him to inform them when Gulfaraz left for home and when deceased Gulfaraz departed for his house, accused Saqlain informed accused Usman and Inzamam. The deceased when reached near accused Usman and Inzamam, accused Usman intercepted his motorcycle and

Inzamam switched off the motorcycle. Accused Usman aimed pistol at the head of deceased and demanded to give his belongings while accused Inzamam pulled the bag of deceased, whereupon the deceased resisted. In the meantime, accused Usman fired with 30 bore pistol at the head of deceased and also fired second shot which hit him at the left side of his ribs and split out from his belly by hitting accused Inzamam at his left leg who was standing on the other side. Deceased Gulfaraz fell down and accused Inzamam repeated third fire which hit deceased at the muscle of his arm. Accused Usman and Inzamam fled away and took bag of the deceased which carried cash, mobile phones and other precious items. Prosecution in order to prove its case produced twenty seven witnesses. A perusal of the record reveals that on the pointation of accused Inzamam-ul-Haq and Usman the weapons of offence and other stolen articles were recovered. The recovery witnesses appeared before the trial Court, got recorded their statement and fully supported the recovery memos but defence despite lengthy cross examination failed to shake the credibility of their statements as witnesses remained stable and confidence inspiring.

As per the report of arm expert is concerned, the recovered cartridges were found to have been fired from the pistols recovered on the pointation of accused Usman and

Inzamam-ul-Haq. The prosecution in F.I.R. did not nominate the present accused persons who were traced during investigation but the one Muhammad Ashfaq was nominated, thus, it could not be presumed by any stretch of imagination that prosecution has implicated the accused persons into the instant case with mala fide intentions rather nominated another person who was subsequently discharged under section 169 Cr.P.C.

The record further depicts that statements of accused persons recorded under section 164 Cr.P.C. were inscribed by putting all necessary questions who probably replied the same. Accused persons confessed their guilt before Magistrate who put a separate note that statement was read over to the accused persons who accepted the same as correct, thus, the statements of the accused persons fully supported the prosecution story. The contention raised by the learned counsel for the accused persons that proper procedure has not been adopted while recording the statement under section 164 Cr.P.C., thus, same could not be relied upon has no force of law because irrespective of procedural defect a confessional statement if found true, voluntary and confidence inspiring may be relied upon for conviction and mere procedural defect shall not vitiate the admissibility of such confessional statement. Reliance can be placed on 2014 PCr.LJ 1036.

We have minutely pondered the statements of the accused recorded under section 164 Cr.P.C. and found the same as voluntary. The assertion raised by the learned counsel for accused persons that statements were not signed by the accused persons rather are fake has no force of law because when they have taken a specific plea then they should bring something on the record but neither got recorded their statements under section 340(2) Cr.P.C. nor produced any evidence in defence, thus, merely on the assertion of the accused the confessional statements which are fully corroborated by other convincing evidence cannot be discarded.

The medical evidence and report of FSL are also in line with the case set up by the prosecution as it is evident from the record that deceased expired due to fire arm injuries and recoveries of pistols further strengthened the prosecution case.

It is also pertinent to mention that in the same incident, accused Inzamam-ul-Haq sustained injury due to firearm shot of accused Usman at his leg and he was arrested from a hospital when he was under treatment. This fact alone in the light of Res Gestae principle is sufficient to observe that accused persons have committed the offence of murder as alleged in the prosecution story because accused Inzamam-ul-

Haq has failed to take any stance regarding injury sustained by him. No doubt, in the case of circumstantial evidence, no link of the chain should be broken or absent and all circumstances must lead to the guilt of the accused and one link of chain should touch the deceased and other to the guilt of accused but if circumstantial evidence is reliable and trustworthy, the same can be made basis for award of even a major punishment.

The discrepancies spotted on by the learned counsel for the accused in the statements of prosecution witnesses are secondary and subordinate in nature, which do not amount to falsify the prosecution version and none of these discrepancies are fatal or critical for the prosecution, thus, such type of subservient inconsistencies are liable to be neglected as being a normal human conduct. Reliance in this regard can be placed on 2014 SCR 421.

As far as the case of acquitted accused is concerned the prosecution has failed to prove by adducing convincing and material evidence that occurrence has been committed with pre-meditation of acquitted accused thus, case of the prosecution to the extent of Saqlain is not persuasive as some material links of chain attracted to give him a benefit of doubt.

The objection elevated by the learned counsel for the accused persons that no independent person from the vicinity was cited as eye witness of occurrence, hence, the

evidence of related witnesses is not believable, is sine any force because evidence of related witnesses is as reliable and believable as statement of a stranger and independent witness because it could not be discarded merely on the ground of relationship particularly in absence of any motive of false implication. Reliance can be placed on PLJ 2007 S.C. (AJ&K) 43 and NLR 1980 Criminal Lahore 659.

As far as the motive behind the occurrence is concerned, the prosecution took a stand that accused persons have committed the murder of deceased when they were snatching and grabbing money and other precious items who resisted and consequently got firearm injury. No doubt, in case of circumstantial evidence motive has got a pivotal role, but in the instant case the entire case of the prosecution reveals that accused persons committed the said offence just in order to rob and plunder money and this stance has been sufficiently proved not only from the recoveries of stolen items but from the statements of the accused persons recorded under section 164 Cr.P.C., hence, it can safely be held that motive of the occurrence is also proved. In the instant case, the guilt of accused is proved by bringing cogent and substantial evidence regarding the place of occurrence, manner of occurrence and motive behind the occurrence without even an iota of ambiguity.

It is also not out of context to indicate that it has been substantiated from the evidence brought on record that accused Usman and Inzamam-ul-Haq paused the way of deceased in order to plunder money and other precious articles but when he resisted, they made up their mind to kill him and open straight fires with the intention of murder or grievous hurt which resulted into death of the deceased and attracted ingredients of section 300 APC, thus, after the murder of deceased offence under section 302 APC was attracted, hence, the Court below has rightly convicted the appellants/convicts under section 302 APC and 394 APC on the basis of Tazir in the light of section 20 EHA in order to cover and deal both parts of incident. It may also be stated here that Statute has not provided the sentence of murder committed during robbery, so when life of a person has been taken during robbery and ingredients of section 300 APC are fulfilled then this Court has left no option except to pass a sentence under section 302 APC, hence, the Court below has rightly convicted accused under section 302 and 394 APC as Tazir in light of section 20 EHA.

Another legal aspect of the instant matter is that the legal heirs of deceased, Muhammad Younis and others, have also filed an appeal for enhancement of the sentence awarded to convict Usman and Inzamam-ul-haq under

section 25 IPL. No doubt, as compared to Pakistan for trial and disposal of criminal cases, a special law known as Azad Jammu and Kashmir Islami (Tazirati) Qwanin Nafaz Act, 1974 has been enacted and section 25 of the said Act provided a remedy to assail the judgment of District Criminal Court which includes Additional District Criminal Court, appeal shall lie to the Shariat Appellate Bench of High Court which included the powers to entertain a revision petition against said order. In Azad Jammu and Kashmir Islami (Tazirati) Qwanin Nafaz Act, 1974 the powers of appellate Court have not been defined, thus, in the light of direction contained in section 32 of the said Act, all the matters which are not specifically explained in this Act, Tazirat-e-Pakistan and Criminal Procedure Code shall apply, we have to go through the provisions of Criminal Procedural Code. As per powers of the Appellate Court alluded in section 423 Cr.P.C., the Appellate Court in disposing of appeal, may reverse the finding and sentence, acquit or discharge the accused, order him to be retried or send for trial, alter the finding maintain the sentence, with or without altering finding reduce the sentence, alter the nature of sentence but not so as to enhance the sentence.

When it has blatantly illuminated in section 423 Cr.P.C that appellate Court is not empowered under this section to enhance the sentence thus, the provisions of section 439 Cr.P.C. shall come into force, which determined the powers of the High Court to exercise revisional jurisdiction, thus, it can safely be held that appellate Court cannot enhance the sentence of convict but it can be enhanced while exercising revisional jurisdiction of this Court, hence, for enhancement of sentence a revision petition shall lie under Section 25 of Azad Jammu and Kashmir Islami (Tazirati) Qwanin Nafaz Act, 1974 to this Court, so appeal filed for enhancement of sentence entails dismissal as not sustainable. Reliance is placed by a judgment of Honorable Supreme Court of Pakistan reported as PLD 2007 SC 405. It is also relevant to indicate that as per various verdicts of the learned apex Court, this Court can convert or modify an appeal into revision or revision into an appeal but such powers are subject to limitation and in this case appeal was filed on 27.03.2018 which is more than 4 years ago, hence, at this stage the same could not be treated or converted into a revision petition and as discussed above, even on merits we do not find any justification to allow the

same. Reliance may be placed on 1995 CLC S.C. (AJK) 1947, 2015 SCR 1190 and 2019 SCR 654.

The Ratio Decidendi recorded by the Court below is justified from the evidence brought on record which is credible, tangible, convincing, cogent, trustworthy and confidence inspiring, hence, entails to be maintained. The prosecution has failed to prove the guilt of the accused Saqlain to the hilt, thus, the impugned verdict to the extent of his acquittal is also liable to be sustained.

The sum and substance of the above discussion is, the impugned edict is hereby sustained and appeals having no essence are hereby sent away.

Muzaffarabad;
03.08.2022.

-Sd-
JUDGE

-Sd-
JUDGE

Approved for reporting.

-Sd-
JUDGE