

P L D 2017 Supreme Court 152**Present: Amir Hani Muslim, Umar Ata Bandial and Khilji Arif Hussain, JJ****AMJAD SHAH---Appellant****Versus****THE STATE---Respondent**

Criminal Appeal No.103 of 2010, decided on 1st February, 2016.

(On appeal from the judgment/order dated 4-2-2009 passed by Lahore High Court, Rawalpindi Bench in Cr.As. Nos.351, 560 and 217 of 2002).

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

---Ss. 302(b) & 34---Qatl-i-amd, common intention---Reappraisal of evidence---Postmortem of the deceased was conducted within fifty (50) minutes of his death---FIR was also promptly lodged within one (1) hour and ten (10) minutes of death of deceased, which excluded the availability of time for deliberations or substitution---No previous enmity was alleged between the complainant and accused parties---Medical evidence fully corroborated the ocular account---Accused had fired a single fire shot on the forehead of the deceased both effectively and decisively in achieving the object of murder---Conviction of accused for murder was maintained in circumstances---Appeal was partly allowed accordingly.

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

---Ss. 302(b) & 34---Qatl-i-amd, common intention---Reappraisal of evidence---Death sentence reduced to imprisonment for life---Mitigating circumstances---No motive whatsoever for the commission of offence was attributed to the accused by the prosecution---Absence of repeated firing dispelled premeditation by the accused to kill the deceased---Accused was merely a volunteer in the occurrence and not a party to the friction between the complainant and accused party---Actual cause of the occurrence, therefore, was not known; its origin vis-a-vis the accused was vague and incomprehensible---Intention, guilty mind or motive of the accused to commit the offence remained shrouded in mystery and was therefore unproven---Possibility existed that the eye-witnesses had withheld evidence that could fairly explain the immediate cause of the occurrence---Sentence of death awarded to accused was altered to that of life imprisonment under S.302(b), P.P.C.---Appeal was partly allowed accordingly.

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

---S.302(b)---Qatl-i-amd---Sentence, reduction in---Mitigating circumstances---Motive---Where the motive was not proved or was not alleged by the prosecution, the court for the sake of safe administration of justice, adopted caution and treated the lack

of motive as a mitigating circumstance for reducing the quantum of sentence awarded to a convict.

Zeeshan Afzal v. The State 2013 SCMR 1602 ref.

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

---S. 302(b)---Qatl-i-amd---Sentence, reduction in---Mitigating circumstances---Age of accused---Youthful tendency toward excitement and impulsiveness were treated by the law as a mitigating circumstance.

Qadeer Ahmed Rana, Advocate Supreme Court for Appellant.

Ahmed Raza Gillani, Addl. PG for the State.

Date of hearing: 1st February, 2016.

JUDGMENT

UMAR ATA BANDIAL, J.-- The appellant Amjad Shah along with his co-accused Sajid Shah (since acquitted) were sentenced to death by the learned Sessions Judge Attock vide judgment dated 24.06.2002 upon conviction under Section 302 read with Section 34 P.P.C. for committing the murder of Muhammad Saleem deceased in an occurrence reported vide FIR No.73 dated 17-04.2002 lodged with Police Station Saddar, Hassan Abdal, District Attock. The two convicts were also fined with Rs.200,000/- each and in case of non-payment thereof, were ordered to suffer imprisonment for two years; half of the amount of fine upon recovery was ordered to be paid to the legal heirs of the deceased as compensation. On appeal the learned High Court vide the impugned judgment dated 04.02.2009 acquitted Sajid Shah accused and maintained the conviction and sentence awarded to the appellant Amjad Shah. Against the impugned judgment leave to appeal was granted by this Court on 03.03.2010.

2. The fateful incident as reported in the FIR is stated to have taken place on 17.04.2002 at about 3:00 p.m. in the area of village Kot Dadu, District Attock. The FIR was lodged at 5:20 p.m. on the written complaint of Sahibzada (PW-12), brother of deceased Muhammad Saleem, who handed over the same to the Investigation Officer (PW-13) at Civil Hospital, Hassan Abdal. On 17.04.2002 at about 1:00 p.m. the deceased along with his brother (PW-12) and nephew Shafaqat Ali (PW-11) rode their tractor trolley to load harvested wheat lying in their land described as 'Mera' in the statements of PW-11 and PW-12 recorded by the learned Trial Court. En route, while crossing another piece of their land described as 'Wasan' they spotted Sajid Shah accused grazing his cattle in their standing wheat crop. The deceased Muhammad Saleem reprimanded and abused Sajid Shah for damaging his standing crop. He had also insulted Sajid Shah for the same reason on the previous day. Feeling humiliated and hurt, Sajid Shah threatened to avenge his disgrace and left for his home. Later in the day, at 3:00 p.m. when the deceased Muhammad Saleem along with his brother Sahibzada (PW-12) and nephew Shafaqat Ali (PW-11) were returning after leading the harvested wheat, they again crossed their 'Wasan' land where both the appellant and Sajid Shah, each armed with 0.30 bore pistol raised lalkara for avenging the insult

caused by the deceased Muhammad Saleem. The latter jumped from the tractor and started running away. Both the accused persons chased him; with PW-11 and PW-12 raising alarm and following at a short distance. The accused Sajid Shah fired one shot from his pistol which missed Muhammad Saleem deceased. Meanwhile, Amjad Shah appellant ran past the deceased and fired at him from the front side striking him fatally on the forehead. Both the accused made good their escape. PW-11 and PW-12 stopped a wagon and took Muhammad Saleem in injured condition to Civil Hospital, Hassan Abdal, where he breathed his last. The police reached the hospital at about 5-00 pm where the PW-12 handed over to the Investigation Officer (PW-13) a complaint against the two accused persons for murdering Muhammad Saleem deceased with common intention to avenge the insult and humiliation caused by the deceased to Sajid Shah accused in the incidents of 17.04.2002 and 16.04.2002.

3. The usual investigation was commenced and the accused Sajid Shah was arrested on 24.04.2004 whilst the appellant Amjad Shah was arrested on 28.04.2004. After completion of the investigation the two accused were sent up to face trial under Section 302/34, P.P.C. The prosecution examined 13 witnesses including Dr. Ishtiaq Hussain (PW-8) who conducted post-mortem examination of the deceased, eye-witnesses Shafaqat Ali (PW-11) and Sahibzada (PW-12) who furnished the ocular account of the incident and the Investigation Officer, Saleem Akhtar, Inspector (PW-13) who provided details about the different limbs of the prosecution case. Both the accused got recorded their statements under Section 342 Cr.P.C. wherein they pleaded their innocence and claimed their false implication in the case due to political rivalry. However, they opted not to appear in their own defence as witness under oath in terms of Section 340(2) Cr.P.C. Upon conclusion of the trial, the learned Trial Court vide judgment dated 24.06.2002 convicted/sentenced both the accused as detailed in the opening paragraph of this judgment.

4. Feeling aggrieved by their conviction/sentence, both the accused filed appeals before the learned High Court. A Murder Reference was also sent by the learned Trial Court for confirmation or otherwise of their death sentence. By means of the impugned judgment dated 04.02.2009 the learned High Court allowed the appeal of accused-Sajid Shah and acquitted him of the charge on the ground of his ineffective firing upon the deceased and also because the motive set up by the prosecution was vague and tenuous. However, conviction as well as the sentence of the appellant-Amjad Shah was maintained on the grounds; that he caused the fatal injury to the deceased; that there was no reason for the prosecution to falsely implicate him in the commission of crime; and that lack of his motive was inconsequential on account of the clear and convincing ocular account.

5. Learned counsel for the appellant has argued against the view taken by the learned High Court about the motive in the present case being irrelevant and has urged that the appellant was roped into the occurrence on account of the political rivalry, which is conceded by both the eye-witnesses i.e. (PW-11) and (PW-12).

6. We have heard the learned counsel for the appellant, the learned Additional Prosecutor General have gone through the impugned judgments and carefully examined the prosecution evidence available on record.

7. The promptitude of the postmortem of the deceased at 5:00 pm within 50 minutes of his death at 4:10 pm and the virtually contemporaneous lodging of the FIR at 5:20 pm by the complainant (PW-12) exclude the availability of time for deliberations or substitution. This view is reinforced by the fact that there is no previous enmity between the complainant and accused parties. Moreover, the medical evidence fully corroborates the ocular account which is therefore forthright and truthful. These aspects make the prosecution case credible. Also the single shot by the appellant fatally struck the forehead of the deceased both effectively and decisively in achieving the object of murder. On that score, the case of the appellant Amjad Shah stands on a different footing from the case of acquitted accused Sajid Shah, the conviction of the appellant is sustainable.

8. Be that as it may, according to the Forensic Science Laboratory ("FSL") report (Exh.PM), the parcel of two crime empties was delivered by Rafiullah Constable (PW-7) on 04.05.2002 simultaneously with the two parcels, each containing 0.30 bore pistols. This destroys the evidentiary value of the recoveries effected and of the FSL report. One may also note that no motive whatsoever for the commission of offence is attributed to the appellant by the prosecution. The verbal reprimand or insult inflicted upon Sajid Shah (acquitted accused) by the deceased Muhammad Saleem lacks gravity and nexus with the appellant-Amjad Shah to enrage him to kill the deceased. In his evidence PW-11 admits that the appellant is not related to the acquitted accused; that they belong to the same clan and are friends. Importantly, the absence of repeated firing dispels premeditation by the appellant to kill the deceased. Indeed the Investigating Officer (PW-13) admitted that he was neither shown any damaged wheat crop nor recovered any harvested wheat, which would fortify the motive given by the prosecution. In these circumstances, the learned High Court disbelieved the motive alleged in the FIR.

9. On an objective appreciation of evidence, the appellant is merely a volunteer in the occurrence and not a party to the friction between the two sides. The real cause of the occurrence as it unfolded is, therefore, not known; its origin vis-a-vis the appellant is vague and incomprehensible. Whilst giving an accurate account of the incident, it is possible that the eye-witnesses have withheld evidence that could fairly explain the immediate cause of the occurrence. Notwithstanding that the participation of the appellant in the commission of offence is duly established, his intention, guilty mind or motive to commit the same remains shrouded in mystery and is therefore unproven. In such like cases where the motive is not proved or is not alleged by the prosecution, the Court for the sake of safe administration of justice, adopts caution and treats the lack of motive as a mitigating circumstance for reducing the quantum of sentence awarded to a convict. Reference is made to *Zeeshan Afzal v. The State* (2013 SCMR 1602). Another ground for mitigation in sentence of the appellant is the fact that about two months after the occurrence, on 10.06.2002 the learned Trial Court whilst framing the charge has recorded the appellant's age to be 24 years and that of his co-accused to be 19/20 years. Youthful tendency toward excitement and impulsiveness are also treated by the law as a mitigating circumstance. Under Section 302(b) P.P.C. imprisonment for life is one of the lawful sentences for the commission of offence under Section 302, P.P.C. In the light of the aforesaid discussion the sentence of the appellant merits reduction from death to life imprisonment.

10. It is rightly urged that although a sentence of life imprisonment under Section 57 P.P.C. extends to 25 years, the same is liable to reduction through remissions granted by the Executive under Section 401 Cr.P.C. and also Rule 216 and Rule 218 of the Pakistan Prison Rules, 1978 ("Prison Rules"). By virtue of Rule 140 of the Prison Rules, every 'lifer-prisoner' must undergo a minimum of fifteen years substantive imprisonment. Notionally, the Executive authorities may on that basis remit in their discretion 10 years imprisonment from the statutory sentence of a lifer-prisoner. Such remission is granted lawfully in exercise of powers vested in the Provincial Government by the aforementioned provisions of law. Reference is made to Abdul Malik v. The State (PLD 2006 SC 365) for an informed discussion on the subject. However, the availability of remissions to lifer-prisoners cannot deprive a sentence of life imprisonment from being a lawful punishment in terms of Section 302(b), P.P.C. Indeed, imprisonment for life is one of the legal sentences following conviction of an accused under Section 302(b) P.P.C.

11. Nevertheless, it is the criteria of entitlement to or for disentitlement to receive remissions granted by the Executive that ought, on account of their considerable impact, be subjected to judicial scrutiny. However, this may be done in a suitable case probing the ambit, object or effect of the remitting power of the Executive rather than a case as the present which involves adjudication or the appellant's culpability and its punishment on merits, rendered in the exercise of appellate jurisdiction. To appreciate the purpose, principles and powers for the grant of remission of sentences under the Prison Rules may require harmonious interpretation of different provisions of such Rules and the Code of Criminal Procedure, 1898 and the manner of dispensations to be made by the overlapping authorities specified in such laws.

12. For the foregoing reasons, this appeal is partly allowed in the terms that the sentence of death of the appellant-Amjad Shah is altered to that of life imprisonment under Section 302(b) P.P.C. The remaining punishment of fine and imprisonment in case of default thereof shall remain intact. He shall also be entitled to the benefit of Section 382-B, Cr.P.C.

13. Herein above are the reasons of our short of even date.

MWA/A-6/S Order accordingly.

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