2009 S C M R 502

[Supreme Court of Pakistan]

Present: Muhammad Moosa K. Leghari, Syed Zawwar Hussain Jaffery and Sheikh Hakim Ali, JJ

IFTIKHAR AHMED KHAN----Appellant

Versus

ASGHAR KHAN and another----Respondents

Criminal Appeal No.57 of 2004, decided on 18th November, 2008.

(On appeal from the order/judgment, dated 7-5-2002 passed by Lahore High Court, Rawalpindi Bench, Rawalpindi in Criminal Appeal No.115 of 1996).

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

----S. 302(b)---Constitution of Pakistan (1973), Art.185(3)---Leave to appeal was granted to complainant to consider the quantum of sentence.

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

----S. 302(b)---Discretion of Court to award sentence of death or punishment of imprisonment for life---Circumstances in which penalty of death must be imposed, stated---Facts and circumstances of each case, as provided by S.302(b), P.P.C. itself, are the best determinative factors for award of penalty of death or that of lesser punishment of imprisonment for life---Law has conferred discretion upon the court to withhold the penalty of death and to award the punishment of imprisonment for life, if the outlook of a particular case requires that course---However, penalty of death must be imposed if the Court finds the manner and method of incident to be in the nature of a brutality, horrific, heinous, shocking involving terrorist nature, creating panic in the society as a whole or in part, callous and cold blooded---In such cases (list is not exhaustive), the penalty of death must not be withheld; in other words, grave inhuman attitude, acts, manners, methods and the criminality of actions are the constituents, elements and the instances, where punishment of death must be awarded.

Khurram Malik v. The State and another PLD 2006 SC 354; Muhammad Yasin and 2 others v. The State 2002 SCMR 391; Ijaz alias Billa and 3 others v. The State 2002 SCMR 294; Haroon Rasheed and 6, others v. The State and another 2005 SCMR 1568 and Zulfiqar Ali v. The State 2008 SCMR 796 ref.

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

----S. 302(b)---Criminal Procedure Code (V of 1898), S.403---General Clauses Act (X of 1897), S.26---Constitution of Pakistan (1973), Arts.13(a) & 185(3)---Sentence, enhancement of---Accused had already served out the sentence of imprisonment for life for the offence for which he was tried .and convicted and had been released from jail---Section 403, Cr.P.C. and S.26 of General Clauses Act, 1897, were not applicable in the facts and circumstances of the case, as the accused was not required to be tried again for the same offence and only his sentence of life imprisonment was sought to be enhanced to death---However, second portion of clause (a) of Art.13 of the Constitution was fully applicable, which prohibited from passing another sentence of death for the same offence, which the accused had already suffered---Accused had also got the expectancy of life due to serving out the sentence of imprisonment for life---Although rule of expectancy of life could not be a sole ground for refusing to enhance the sentence, yet it would be applicable with full force when a convict had served out the complete sentence of life imprisonment and had already been released at the time of hearing and final decision of the appeal---Appeal for enhancement of sentence was dismissed accordingly.

Muhammad Afzal v. Ghulam Asghar and others PLD 2000 SC 12; Sakhawat v. The State 2001 SCMR 244; Arshad Ali alias Achhu v. The State' 2002 SCMR 1806; Ijaz alias Billa and 3 others v. The State 2002 SCMR 294; Muhammad Yasin and 2 others v. The State 2002 SCMR 391; Syed Hamid Mukhtar Shah v. Muhammad Azam and 2 others 2005 SCMR 427; Muattiullah Khan v. The State 2005 SCMR 1626; Latif Ullah v. The State 2007 SCMR 994; Zulfiqar Ali v. The State 2008 SCMR 796; Muhammad Iqbal v. The State 2006 SCMR 216; Abdur Rehim alias Rahima and others v. The State and others PLD 2003 SC 662; Aziz Muhammad v. Qamar Iqbal and others 2003 SCMR 579; Abdul Haq v. Muhammad Amin alias Manna and others 2004 SCMR 810; Abdul Malik and others v. The State and others PLD 2006 SC 365; Khurram Malik v. The State and another PLD 2006 SC 354; Haroon Rasheed and 6 others v. The State and another 2005 SCMR 1568; Mst. Razia Begum v. Jehangir and others PLD 1982 SC 302; Mst. Promilla and others v. Safeer Alam and others 2000 SCMR 1116; Amir Khan and others v. The State and others 2002 SCMR 403; Muhammad Noor alias Norak v. Member, Board of Revenue, Balochistan and others PLD 1985 SC 335; Bahadur Ali and others v. The State and others 2002 SCMR 95; Kala Khan and others v. Misri Khan and others 1979 SC 347 and Agha Dinal Khan v. Saffar and others 2008 SCMR 728 ref.

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

----S. 302(b)---Sentence, enhancement of---Expectancy of life--Rule of expectancy of life shall be applicable with full force when a convict has served out the complete sentence of imprisonment for life and has already been released at the time of hearing and final decision of the appeal.

Agha Dinal Khan v. Saffar and others 2008 SCMR 728 ref.

Malik Rab Nawaz Noon, Senior Advocate Supreme Court for Appellant.

Muhammad Ilyas Siddiqui, Advocate Supreme Court for Respondent No. 1.

Mian Asif Mumtaz, D.P.,-G. Punjab for Respondent No.2.

Date of hearing: 18th November, 2008.

JUDGMENT

SHEIKH HAKIM ALI, J.---When sentence of life imprisonment has been served,

When taste of regained life has been relished,

When expectancy of life has returned,

When the liberated bird has begun to sing,

Would it be advisable to take it to gallows?

The above poetic phrases have displayed the whole case in nutshell, yet to reach the correct conclusion, the details of the occurrence are necessary to be noted in this judgment. Record reveals that 14 years back i.e. on 14-11-1994, one Raja Khan son of Sher Ahmed had got registered an F.I.R. No.90 with Police Station Bhatar, District Attorney, at about 6-30 p.m. with regard to murder of Safdar Khan son of Sher Ahmed, his nephew, attributing the murder of the aforementioned deceased to Asghar Khan son of Akbar Khan. According to the allegations contained in the above noted F.I.R., it was stated that Asghar Khan armed with .12 bore double barrel gun was standing on the roof of the house of Nawaz Khan son of Sher Ahmed (another brother) when Safdar Khan had entered into his house, Asghar Khan, had raised Lalkara to Safdar Khan and had uttered that he would teach him a lesson for obtaining an injunctive order regarding the land sold by Akbar Khan to Malik Khan, and had thereafter fired upon Safdar Khan the deceased, which single shot had hit the deceased on the left side of the back of his chest, due to which, the deceased had expired instantaneously at the spot.

2. Explaining the motive, it was stated therein that informant had three more brothers namely Nawaz Khan, Akbar Khan acid Safdar Khan, amongst whom respectable of Beradari had got divided the lands in separate shares. Akbar Khan had sold his land out of his share to one Khan Malik. When the aforementioned purchaser started construction, Safdar Khan had obtained an injunctive order from the Court due to which Asghar Khan son of Akbar Khan (accused), the present respondent had borne grudge. It was to this animosity, that Asghar Khan had committed the above noted offence. Asghar Khan, respondent was tried by the learned Sessions Judge, Attock who through his judgment dated 11-6-1996 sentenced respondent No.1 to death, under section 302(b) of the P.P.C. He was also directed to pay compensation of Rs.50,000 to the legal heirs of the deceased, as required by section 544-A of the Cr.P.C. When the above noted sentence was laid before the Lahore High Court, Rawalpindi Bench, a learned Division bench of the aforementioned High Court maintained the conviction but reduced the normal penalty of death to that-of imprisonment for life on the ground:---

(i) prosecution had failed to bring on record copy of temporary injunctive order obtained from civil Court;

(ii) it was not clear as to what had happened at the spur of moment between the deceased and the accused before the commission of actual offence;

(iii) accused was a teenager at the time of occurrence; and

(iv) that he had not repeated the fire shot.

3. This judgment announced on 7-5-2002 was challenged through criminal petition for grant of leave in which leave was granted on 14-4-2004, to consider the quantum of sentence.

4. Appellant's learned counsel submits that. the learned Division Bench of the High Court has failed to appreciate the record of the case, as there was no need to produce copy of injunctive order of the learned civil Court because Asghar Khan accused in his statement, recorded under section 342 of the Cr. P. C. while answering question No.3, had admitted this fact. As regards the second reason, which had weighed with learned Division Bench, the appellant's learned counsel submits that the accused was not a teenager as his age was noted as 21 years while recording his statement under section 342 of the Cr.P.G. Regarding the third ground, learned counsel submits, that even solitary shot was sufficient to award normal penalty of death and it was not a good ground for imposition of lesser penalty of life imprisonment. Further submits that the lack of details of happening of the event or as to what had occurred at the spur of moment before the happening of the incident, could not be considered a ground for withholding normal penalty of death. Non-repetition of shot was also not a ground when the fire shot was made upon the chest. He has referred to a plethora of judgments which are noted as follows:--

(1) Muhammad Afzal v. Ghulam Asghar and others PLD 2000 SC 12, (2) Sakhawat v. The State 2001 SCMR 244, (3) Arshad Ali alias Achhu v. The State 2002 SCMR 1806, (4) Ijaz alias Billa and 3 others v. The State 2002 SCMR 294, (5) Muhammad Yasin and 2 others v. The State 2002 SCMR 391, (6) Syed Hamid Mukhtar Shah v. Muhammad Azam and 2 others 2005 SCMR 427, (7) Muattiullah Khan v. The State 2005 SCMR 1626, (8) Latif Ullah v. The State 2007 SCMR 994 and (9) Zulfiqar Ali v. The State 2008 SCMR 796.

Lastly submits that the Judge should not hesitate to pass the sentence of death when the case requires such a course. To support this contention, he has referred to Muhammad Yasin v. The State 2002 SCMR 391 and Muhammad Iqbal v. The State 2006 SCMR 216.

5. Conversely, respondent's learned counsel submits that respondent No.1 has served out the life imprisonment punishment, and has already been released from

the jail, therefore, at this stage imposition of penalty of death would be awarding a second punishment for the same offence. He has referred to Abdur Rehim alias Rahima and others v. The State and others PLD 2003 SC 662, Aziz Muhammad v. Qamar Iqbal and others 2003 SCMR 579, Abdul Haq v. Muhammad Amin alias Manna and others 2004 SCMR 810, and Abdul Malik and others v. The State and others PLD 2006 SC 365. As per learned counsel, there was a quarrel before the alleged occurrence between the accused and the deceased and this was deposed by Raja Khan, in his statement in the Court and the venue of the occurrence was also changed. According to the learned counsel, the motive set up by the prosecution was also not proved as respondent could have no ill-will to cause the murder of the deceased as it was a matter between the purchaser and the deceased and the accused had no concern with it. Respondent No.1 was a teenager at the time of alleged occurrence, therefore, he was rightly awarded lesser punishment of life imprisonment.

6. Learned Deputy Prosecutor General has also assisted the Court through his arguments. According to the Law Officer, although one fire shot was not sufficient to pass a lesser sentence of imprisonment for life, yet in Muhammad Afzal v. Ghulam Asghar and others PLD 2000 SC 12, sentence was not enhanced, as it was to offend the provision of Article 13 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the "Constitution") as the respondent No.1 had already served out the complete sentence. Learned D.P.-G. also submits that failure of prosecution in proving the motive, cannot be considered a ground to withdraw the imposition of normal penalty of death as held in Zulfiqar Ali v. The State 2008 SCMR 796.

7. With utmost respect and due regard to the precedents cited at the Bar, it is deemed appropriate by the Author to note down the following phrase:---

> Precedents are like a treasure of diamonds,
>
> Having in its store various kinds of jewels, and gems,
>
> Lying in different colours, shapes and qualities,
>
> But it is for the persons to search and select.

8. Lengthy arguments of the learned counsel, the consideration of facts- and the examination of law on the subject, have brought us to conclude that at this stage no case for altering the punishment for life to that of death sentence is made out. Consequently, this criminal appeal is liable to be dismissed for the following reasons:

> (i) No doubt in the statement of Asghar Khan, accused recorded under section 342 of the Cr. P. C., sale of land, filing of suit and obtaining injunctive order was admitted by the accused, yet the prosecution was not absolved of its duty to produce those documents. If the arguments are accepted for a short while, even then this cannot be of any help to the case

of the prosecution because the injunction obtained from the civil Court was to cause annoyance to Khan Malik, the purchaser and not to. Asghar Khan accused, whose father had already sold away the land in dispute. It would not be possible to create feeling of hostility to such an extent so as to cause the murder of Safdar Khan deceased. There is also another aspect of this case, as pointed out by the learned counsel for the respondent/accused. There was a quarrel before the incident had taken place as admitted by informant himself in his statement. The statement of Dr. Muhammad Shujaat Khan, P.W-1 is also interesting, wherein in the cross-examination, he had admitted that injuries had displayed blackening and charring, which could be caused within a range of six feet. How the blackening and charring had resulted to the injuries, was not explained by the prosecution, when the accused was allegedly on the top of the roof and the deceased was on the ground as evident from the site map Exh. P. C. placed on the record.

(ii) We have also found that accused respondent was charge sheeted on 18-9-1995, near about after one year of the occurrence. In the aforesaid charge sheet, his age was noted and entered as 20 years. In other words, he was near about 19 years of the age at the time of alleged occurrence, thus was a teenager, which had entitled him for the award of benefit available to a teenager.

(iii) As regards the arguments of the learned counsel td advance the propositions' that solitary shot, non-repetition of it, and the incident having taken place at the spur of moment, these could not be grounds to withhold the award of punishment of death sentence are certainly undisputable. There was no cavil to such propositions. However, each case has to be examined in the light of its own vistas. The facts and circumstances of each case are the best determinative factors for award of penalty of death or that of lesser punishment of life imprisonment. According to section 302(b) of the P.P.C., the normal punishment for Qatl-i-Amd is death but the imprisonment for life as Ta'zir can be awarded having regard to the facts and circumstances of the case in hand. To appreciate this reasoning, the provision of section 302(b) is reproduced which reads as follows:---

"302. Punishment of Qatl i-Amd. Whoever commits Qatl-i-Amd shall, subject to the provisions of this Chapter be:

(a) ----------

(b) Punished with death or imprisonment for life as Ta'zir having regard to the facts and circumstances of the case, if the proof in either of the forms specified in section 304 is not available; or

(c) ---------- "

(underlining is ours).

In other words, the law has conferred discretion upon the Court to withhold the penalty of death and to award the punishment of imprisonment for life, if the outlook of a particular case requires that course. Question arises, as to what could be those facts and circumstances in which penalty of death must be imposed and lesser penalty of life imprisonment should not be awarded.

The analysis of all the cases has led us to a conclusion that from the facts and circumstances of the case, if the Court finds the manner and method of incident, to be in the nature of a brutality, horrific, heinous, shocking, involving terrorist nature, creating panic to the society as a whole or in part, callous and cold blooded, in such cases (which list is not exhaustive), the penalty of death must not be withheld. In other words, grave inhuman attitude, acts, manners, method and the criminality of actions are the constituents, elements and the instances, where punishment of death must be awarded. The following judgments have helped us to reach to this conclusion:--

> "In Khurram Malik v. The State and another PLD 2006 SC 354, life imprisonment was converted into death when dead body was cut with Churry into pieces and was thrown at different places.
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> In the case of Muhammad Yasin and two others v. 'The State 2002 SCMR 391 Bank robbery was committed, panic was created by resort to firing, one innocent person lost his life while two were injured, and Bank was looted. When the accused were chased by police, an encounter was taken by the accused.
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> In the judgment of Ijaz alias Billa and three others v. The State 2002 SCMR 294 the facts reveal that it was a cold blooded, callous and premeditated murder in a shopping centre which had caused terror and insecurity in the mind of the people of the locality.
>
> In the case of Haroon Rasheed and 6 others v: The State and another 2005 SCMR 1568 three young persons were done to death brutally as firing at spot was indiscriminately made.
>
> In the case of Zulfiqar Ali v. The State 2008 SCMR 796 although there was no repetition of shot yet an innocent lady with an unborn child in the womb was done to death and when the person who tried to save her life, was also hit by the accused, therefore, non-repetition was not considered a ground for awarding lesser penalty of life imprisonment.

9. In law, there are two legal maxims on this point:---

> (i) Autrefois acquit and autrefois convict (formerly acquitted and formerly convicted) and the other is,
>
> (ii) Nemo debet bis veicari pro una et eadem causa (It is a rule of law that a man shall not be twice vexed for one and the same cause):

Principles of autrefois acquit and autrefois convict are incorporated in section 403 of the Criminal Procedure Code, 1898, which provides that persons once convicted or acquitted are not to be tried for the same offence. But this principle is not stricto sensu applicable to the facts and circumstances of the case in hand because convict is not being tried for the same offence again by any other Court as the present proceeding is, in fact, a continuation of the same proceeding which had commenced from the first Court. It is not a fresh or another round or trial of the proceeding against the accused after his conviction for the same offence.

(iv) There is another provision of section 26 of the General Clauses Act, 1897. According to that provision which provides that an act or omission if constitutes an offence under two or more enactments, in that event, the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished again for the same offence. This section is also not precisely applicable to the facts and IF circumstances of the present case.

(v) There is another important aspect of this case which has restrained us to convert the sentence of life imprisonment into death. It is Article 13 of the Constitution which is attracted to this case and is reproduced below:--- .

"13. No person--

(a) shall be prosecuted or punished for the same offence more than once; or

(b) shall, when accused of an offence, be compelled to be a witness against himself."

10. In clause (a) of Article 13 of the Constitution, two situations have been kept in view, one is prosecution and the other is punishment. When a person has been prosecuted and punished for the same offence, then he cannot be retried for the same offence. The other, situation is that of a person, who has been punished for an offence, in that event, he cannot be punished once again for the same offence. To our mind this second portion of clause (a) of Article 13 of the Constitution comes into play and is fully applicable to this case. It is an admitted fact that respondent/convict has already served out the sentence of life imprisonment for the offence, as he has been tried and convicted and has been released from jail. In other words, if we decide to convert the sentence of life imprisonment into punishment of death, this Article 13 of the Constitution prohibits us from passing another sentence of death for the same offence which he has already suffered. Respondent No. 1 has already served out the substantial and legal sentence of punishment of life imprisonment. In that eventuality, it would be a case of double jeopardy also. On this point of law, there is no dearth of authorities, some of which are noted and quoted as below:---

(i) Aziz Muhammad v. Qamar Iqbal and others 2003 SCMR 579,

(ii) Abdul Haq v. Muhammad Amin alias Manna and others 2004 SCMR 810 in which Mst. Razia Begum v. Jehangir and others PLD 1982 SC 302, Mst. Promilla and others v. Safeer Alam and others 2000 SCMR 1166 and Amir Khan and others v. The State and others 2002 SCMR 403 have also been referred.

(iii) Muhammad Noor alias Norak v. Member, Board of Revenue, Balochistan and others PLD 1985 SC 335 and Bahadur Ali and others v. The State and others 2002 SCMR 95 can also be referred.

(iv) Muhammad Afzal v. Ghulam Asghar and others PLD 2000 SC 12.

(vi) Due to serving out the sentence of life imprisonment, the respondent/convict has also got the expectancy of life. Although this expectancy of life rule cannot be a sole ground as argued by the learned counsel for the appellant which is supported by him through the judgments of Kala Khan and others v. Misri Khan and others 1979 SCMR 347, yet the latest judgment of Agha Dinal Khan v. Saffar and others 2008 SCMR 728 has come to the rescue of the respondent-convict. The rule of expectancy of life too shall be applicable with full force when a convict has served out the complete sentence of life imprisonment and has already been released at the time of hearing and final decision of the appeal, therefore, we have decided not to accept the appeal.

11. Accordingly we dismiss the appeal.

N.H.Q./I-4/SC Appeal dismissed.

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