

2012 S C M R 74**[Supreme Court of Pakistan]****Present: Tassaduq Hussain Jilani, Mahmood Akhtar Shahid Siddiqui and Asif Saeed Khan Khosa, JJ****Mst. SABEEHA---Appellant****Versus****IBRAR and others---Respondents**

Criminal Appeal No. 347 of 2003 and Criminal M.A. No. 131 of 2008, decided on 15th September, 2011.

(On appeal from the judgment dated 23-1-2003 passed by the Peshawar High Court, Peshawar in J. Cr. A. 203 of 2002 and M.R. No.10 of 2002).

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

---S. 302(b)---Criminal Procedure Code (V of 1898), S. 367(5)---Qatl-e-amd---Sentence---Principles---Sentences provided under S. 302(b), P.P.C. are "death" or "life imprisonment"---If case stands proved against accused and court is not persuaded to award him death sentence and proceeds to award latter sentence, then under S.367(5), Criminal Procedure Code, 1898, court has to give reasons.

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

---Ss.302 (b)/148/149---Qatl-e-amd and unlawful assembly armed with deadly weapons---Reappraisal of evidence---Life imprisonment---Sentence of death awarded to accused was converted into imprisonment for life---Validity---None of the prosecution witnesses including injured witnesses attributed any specific injury to any of the accused and three co-accused remained fugitive from law---Uncertainty regarding fatal injuries and prosecution case regarding two co-accused was not worthy of reliance and they were acquitted---Judgment passed by High Court reducing sentence of death into imprisonment for life was neither arbitrary nor unjust---When an unlawful assembly armed with deadly weapons was resorting to indiscriminate firing, it was not possible to identify as to whose fire hit whom and in such circumstances, award of maximum sentence would not be in consonance with safe administration of justice---Supreme Court declined to interfere in the judgment passed by High Court---Appeal was dismissed.

Muhammad Latif v. The State 1984 SCMR 284; Allah Dad v. The State 1995 SCMR 142; Muhammad Tashfeen v. The State 2006 SCMR 577 and Naik

Muhammad v. The State 2007 SCMR 1639 **rel.**

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

---S. 302---Qatl-e-amd---Weapon produced by co-accused---Place of recovery---Effect---Plea raised by complainant was that empties of weapon matched with the weapon recovered---Validity---Weapon in question was neither produced by accused nor recovered from place, which was in his exclusive possession rather it was in the possession of co-accused who produced the weapon ---Plea of complainant was not tenable.

Jan Muhammad Khan, Advocate-on-Record for Appellant.

Nemo for Respondent No. 1.

Respondent No. 2 in person along with Alipur Khan, Surety and Noorul Baswar, Surety.

Syed Arshad Hussain, Additional A.-G., KPK for the State.

Date of hearing: 15th September, 2011.

ORDER

TASSADUQ HUSSAIN JILLANI, J.---This order shall dispose of Criminal Appeal No. 347 of 2003 filed by Mst. Sabeeha for the enhancement of sentence granted to the respondents Ibrar and Zavaiz Khan and Criminal M.A. No. 131 of 2008 filed by Zavaiz Khan seeking acquittal on the basis of compromise.

2. Facts giving rise to the instant appeal briefly stated are that on the application of appellant Sabeeha, a case was registered vide F.I.R. No.271 dated 29-4-1999 under sections 302/324/449/201/202/148/149, P.P.C. at Police Station Lahor District Swabi for the murder of four persons namely Ishrat, Zari Bano, Rabia and Iftikhar brother of respondent-convict Ibrar. It was alleged that six accused named in the F.I.R. having formed an unlawful assembly, sharing common intention and armed with deadly weapons, attacked the complainant party at about 8 a.m. and resorted to indiscriminate firing as a consequence of which the afore-referred deceased received fatal injuries and died at the spot. The motive alleged was dispute over possession of the house in which the complainant party was residing. The learned Trial Court vide its judgment dated 19-6-2002 convicted all the accused under section 302, P.P.C. and sentenced in terms as follows:--

(1)	Ibrar and Zavaiz Khan	They have been awarded sentence of death on four counts under section 302(b)/148, P.P.C. with a fine
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		of Rs. 50,000 as compensation for legal heirs of the deceased. They have been further sentenced to five years' RI each on one count under section 324/149, P.P.C. with a fine of Rs. 5,000 and to a sentence of one years' RI each under section 148/149, P.P.C. Also to undergo sentence of life imprisonment each under section 449/149, P.P.C.
(2)	Accused Abdullah Jan and Sher Jan	They have been convicted and sentenced to seven year RI each under section 311/149, P.P.C. to seven year RI each under section 324/149, P.P.C. with a fine of Rs.5,000 each and also sentenced to imprisonment for life under section 449/149, P.P.C. each and to one year RI each under section 148/149, P.P.C.
(3)	Co-accused namely Wazar, Dowery and Akhtar Zameen	Proclaimed offenders.

3. The learned High Court however, vide its judgment dated 23-1-2003 acquitted Abdullah Jan and Sher Jan on the basis of compromise and partly allowed the appeal of Ibrar and Zavaiz by way of reducing their sentences from death to life imprisonment.

4. During pendency of this appeal, appellant Zavaiz Khan filed Criminal M.A. 131 of 2008 stating therein that he has compromised with the heirs of the deceased and that he be acquitted. The following legal heirs were summoned by this Court and their statements were recorded on 26-6-2008:--

- (1) Mst. Sabeeha, P.W.11 daughter of Said Azam
- (2) Mst. Najat daughter of Said Azam
- (3) Zaman Khan son of Waris Khan P.W.12
- (4) Amir Nosh son of Waris Khan

5. All of them affirmed the factum of compromise and that they had forgiven him in the name of Almighty ALLAH and had no objection if he is acquitted of the charge. Leave was granted by this Court vide the order dated 3-11-2003 in terms as follows:--

- (i) Whether the reasons which had weighed with the learned High Court in the absence of mitigating circumstances for converting the death sentence on four counts of accused/respondents namely Ibrar and Zavaiz Khan to life imprisonment under section 302(b), P.P.C. can be considered as cogent and sound in view of the fact that normal penalty for Qatl-e-amd under section 302, P.P.C. is death.
- (ii) Whether the question of factum of sentence has been dilated upon and decided in accordance with settled norms of justice and well-entrenched legal principles concerning the criminal administration of justice.
- (iii) Whether the question of vicarious liabilities/common intention has been dealt with in view of the prevalent circumstances of the case and in accordance with law.
- (iv) Whether the salient features of the case such as eye account duly corroborated by medical evidence, factum of recovery, positive Forensic Science report (Exh.P/K.13/6) and the fact that accused/respondents remained absconded have been decided after having scrutinized the entire record property."

6. Learned counsel for the appellant submitted that the respondent Ibrar had acted in a callous manner; that he came armed with the kalashankov, resorted to indiscriminate firing in consequence of which four persons died; that the prosecution case stood proved beyond reasonable doubt; that under section 302, P.P.C. the law mandates that the accused be awarded the maximum sentence provided in law unless the Court had reasons to be recorded. The reasons recorded by the learned High Court vide the impugned judgment, according to him, are not tenable in law.

7. Learned Additional Advocate-General did not defend the impugned judgment in so far as it reduced the sentence of Ibrar as according to him, the convict had acted in a callous and cruel manner that he killed his own kith and kin and that the empties of kalashankov recovered matched with the kalashankov recovered on the pointation of respondent Ibrar and there was no mitigating circumstance which could warrant reduction of sentence. Learned Law Officer however, did not oppose the application filed by Zavaiz Khan for acquittal on the basis of compromise, as according to him, the legal heirs have already pardoned him and the State would have no objection.

8. Having heard learned counsel for the appellant and learned Law Officer and having gone through the impugned judgment, we are of the view that the sentences provided under section 302(b), P.P.C. under which the respondents and others were convicted, are 'death' or 'life imprisonment'. However, the law mandates that if the case stands proved against an accused and the Court is not persuaded to award him the former sentence and proceeds to award the latter sentence, it has to give reasons. Subsection (5) of section 367, Cr.P.C. reads as under:--

"367. Language of judgment: Contents of judgment.

- (1)

- (2)
- (3)
- (4)
- (5) If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, and Court shall in its judgment state the reason why sentence of death was not passed.
- (6)"

9. In the instant case as well, the learned trial Court while awarding life sentence to the remaining accused, had given reasons. The learned High Court converted the sentences of death of the respondents and gave following reasons:--

"7. No doubt that four persons have lost their lives and presence of Mst. Sabeeha (P.W.11) on the spot could not be disputed but following are our reasons for converting the death sentence on four counts of appellants and Zavaiz to life imprisonment under section 302(b), P.P.C.:--

- (a) Six persons are charged to have used Klashankoves but it is not know that whose shot hit which of the deceased and also whether shots fired by each of the appellants and the absconding accused proved fatal as it was simultaneous and random firing.
- (b) Ten empties of Klashanikov were recovered from the spot that too from one point namely, point No. 13 and all these empties have matched with one Klashanikov as is apparent from report of Fire Arm expert Exh.PK from which one can infer that only one weapon was used. Such Klashnikov though recovered on the pointation of Ibrar appellant but was not from his immediate possession. According to the statement of Bashir Muhammad SHO (P.W.9) such rifle was handed over to one Liaqat who then passed it on to Wazir accused and when asked by Ibrar, Wazir brought the weapon from his house. Such recovery cannot definitely link the use of it by Ibrar alone.
- (c) Other than Ibrar, Zavaiz has got no direct motive and motive alleged against Ibrar is also not proved. It is also not known as to why on the very day of occurrence all the six accused got together and committed the offence.
- (d) Mst. Sabeeha and her sister Mst. Nijat are the only two surviving legal heirs of the four deceased and being consanguine sisters they are sharers and are to inherit from Ibrar the appellant. On this ground again the sentence of death would not be called for.
- (e) The two sisters, named above, have appeared before under section in court. They are both major and married and they stated at the bar in presence of elders that they have waived their right of qisas for all the murders, they stand compensated and that they do not want the enhancement of compensation."

10. Admittedly none of the prosecution witnesses including the injured witnesses attributed any specific injury to any of the accused and three of the co-accused remained fugitive to law. This uncertainty qua the fatal injuries and the fact that

qua two of the co-accused, the prosecution case was found not worthy of reliance and they were acquitted, the afore-referred reasons given by the learned High Court in reducing the sentences of death of the appellants/respondents into life imprisonment is neither arbitrary nor unjust. The argument of learned counsel for the appellant that the learned High Court should not have reduced the sentence of respondent Ibrar because 10 empties of kalashankov were recovered and matched with the kalashankov recovered on his pointation from Wazeer Khan co-accused, would not be tenable in the facts and circumstances of this case because admittedly the kalashankov in question was neither produced by respondent Ibrar nor recovered from a place, which was in his exclusive possession rather it was in the possession of co-accused Wazeer Khan. It was he who produced the said kalashankov to the Investigating Officer. Even otherwise when an unlawful assembly armed with deadly weapons is resorting to indiscriminate firing, it is not possible to identify as to whose fire hit whom and in such circumstances the award of maximum sentence of death would not be in consonance with safe administration of justice. Admittedly in the instant case, no prosecution witness attributed any specific fatal injury to respondent Ibrar. In Muhammad Latif v. The State (1984 SCMR 284), the Court in similar circumstances granted benefit to the convict. A similar view was reiterated in Allah Dad v. the State (1995 SCMR 142) as under:--

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

----S.302/34---Sentence---Mitigating circumstances---Record did not show with certainty that it was the shot of the accused which killed the deceased and not of the other accused---Sentence of death awarded to accused was altered to imprisonment for life in circumstances.---(Sentence]."

11. This was followed in Muhammad Tashfeen v. The State (2006 SCMR 577), wherein it was observed that since the evidence was not clear as to who was exclusively responsible for causing fatal injury to the deceased, the sentence of imprisonment for life awarded to accused was sufficient to meet the ends of justice. In Naik Muhammad v. The State (2007 SCMR 1639), this Court maintained the judgment of the High Court whereby the death sentence was reduced to life imprisonment as the fatal shot was not ascertainable.

12. For what has been discussed above, the judgment of the learned High Court in so far as it reduced the sentences awarded to the respondents is open to no exception. The appeal having no merit is accordingly dismissed. So far as Criminal M.A. No.131 of 2011 is concerned, since admittedly all the legal heirs of the deceased have forgiven the respondent Zavaiz Khan in the name of Almighty ALLAH and learned Law Officer has no objection, the same is allowed and the impugned judgment qua respondent Zavaiz Khan is set aside. He is acquitted of the charge. Since respondent Zavaiz Khan is out of prison having been granted bail by this Court, he shall not be retaken into custody in connection with the instant case.

M.H./S-52/SC Order accordingly.

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