

2000 P Cr. L J 1962

[Peshawar]

Before Sardar Muhammad Raza Khan, C. J. and Malik Hamid Saeed, JJ

SIKANDAR SHAH and another---Appellants

versus.

THE STATE---Respondent

Criminal Appeal No.242 of 1997, decided on 27th April, 2000.

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

---S. 302/307/34---Appreciation of evidence---Dying declaration-- Complaint by deceased attributing specific role to the accused persons-- Complainant soon after the occurrence had narrated the occurrence to the police in hospital in injured condition in presence of doctor---Such statement of the deceased was certified by the doctor that the same was recorded in his presence and the deceased was fully conscious and capable, to make statement---Deceased had directly charged the accused persons by attributing the specific roles of firing and motive for the commission of the offence was also disclosed---Effect---Where the dying declaration of the deceased and statement of prosecution witness were having every material support from the other circumstantial evidence and the same was credible and worth reliance, such evidence was rightly relied upon by the Trial Court-- Conviction and sentence imposed by the Trial Court was maintained.

PLD 1958 Pesh. 147; PLD 1989 SC 633 and PLD 1990 SC 1172 ref.

(b) Criminal Procedure Code (V of 1898)---

---S. 364---Confession---Where confessional statement was fully consistent with the oral and circumstantial evidence, no illegality was committed by Trial Court in placing reliance on such part of the statement.

(c) Constitution of Pakistan (1973)---

---Art. 12---Penalty to offender---Scope---Offender could not be inflicted greater or a different penalty which was not prescribed when the offence was committed under Art.12 of the Constitution---Provision of Art.12(1)(b) of the Constitution was related to the punishment prescribed by law and did not deal with the power of trial forums.

Qazi Muhammad Anwar for Appellant.

Ishtiaq Ibrahim, Asstt. A.-G. for the State.

Khawaja Muhammad Khan for the Complainant.

Dates of hearing: 16th and 17th February, 2000.

JUDGMENT

MALIK HAMID SAEED, J.--- Sikandar Shah son of Abdul Aziz and Akbar Shah son of Qalandar Shah, accused-appellants, faced trial in the Court of learned Sessions Judge/Zilla Qazi, Buniar at Daggar on the charges that they on 11-7-1990 at 12-00 noon in furtherance of their common intention:

- (i) committed the murder of Gul Taj (complainant) by firing at him,
- (ii) committed the murder of Noor Muhammad Khan by firing at him,
- (iii) committed the murder of Sarzamin by firing at him,
- (iv) caused fire-arm injuries to Mst. Sherinai, wife of Gul Majid; and also
- (v) caused fire-arm injuries to Bakhat Mand.

The learned trial Judge found the accused-appellants guilty of the charges and accordingly convicted and sentenced both the appellants vide judgment, dated 2-9-1997 as under:--

- (a) Under section 302/34, P.P.C. for the murder of Noor Muhammad, death sentence with a fine of Rs.2,000 each or in default to undergo one year's R.I. Half of the fine, if recovered shall be paid, to the legal heirs of the deceased as compensation.
- (b) Under section 302/34, P.P.C. for the murder of Sarzamin, death sentence with a fine of Rs.20,000 each or in default to undergo further one year's R.I. Half of the fine, if recovered, was ordered to be paid to the legal heirs of the deceased as compensation.
- (c) Under section 307/34, P.P.C. for causing fire-arm injuries to Mst. Sherinai, 3 years' R.I. with a fine of Rs.2,500 each or in default to suffer one month R.I.
- (d) Under section 307/34, P.P.C. for causing fire-arm injuries to Bakht Mand, 3 years' R.I. with a fine of Rs.2,500 each or in default to suffer one month R.I.

As the legal heirs of deceased Gul Taj compromised the matter with the appellants in the trial Court, therefore, the appellants were acquitted of the charge of murder of Gul Taj, deceased.

The learned trial Judge has also sent murder references for confirmation or otherwise of the death sentences of the appellants to this Court, which are also before us. The

same shall also be answered through this judgment in Criminal Appeal No.242 of 1997.

2. The prosecution case as disclosed in the F.I.R.-cum-dying declaration, Exh.P.A., lodged by Gul Taj, complainant, in injured condition at Civil Hospital, Daggar on 11-7-1990 at 12-00 noon is to the effect that on the day of occurrence, he alongwith Noor Muhammad and Sarzamin Khan sons of Najim, residents of Kattakot after attending date of hearing in the Court at Daggar were returning to their village in Bus No.2485/SW, when at 12-00 noon reached at Sawari Bazar Adda, there emerged Akbar Shah son of Qalandar Shah armed with a single barrel shot-gun and Sikandar Shah son of unknown, residents of Chinarr armed with .7 m.m. rifle and started firing at them in the bus. With the fire shots of Akbar Shah, Sarzamin was hit and from the fire shots of Sikandar Shah, Noor Muhammad received fire-arm injuries whereas from the firing of both the accused he himself and Mst. Sherinai wife of Gul Majid (another passenger of the bus) and Bakht Mand received fire-arm injuries. Noor Muhammad received injuries on left side of the chest, Sarzamin received injuries on the back of the body, Mst. Shermai on her head, Bakht Mand on left side of the neck whereas he himself received injuries on the back right side of hip. The accused after the occurrence decamped from the spot. The complainant further stated that besides him the occurrence has been witnessed by other persons also who were present on the spot at that time. The motive for the occurrence was disclosed to be blood-feud enmity. It was also disclosed that Noor Muhammad and Sarzamin have succumbed to their injuries.

3. The report of the injured-complainant was reduced into writing in the shape of Murasila by Muhammad Amin, S.H.O., in presence of Doctor Zafar Ali (P.W.5) who also certified that the injured was in senses at the time of making his report to the police.

4. Dr. Zafar Ali Khan, P.W:5, on 11-7-1990 examined the external injuries on the dead bodies of Noor Muhammad and Sarzamin and opined that the same have been caused through fire-arm. Similarly, he also examined, the injured Gul Taj, Mst. Sherinai and Bakht Mand and gave his reports about the nature and injuries on their persons. Gul Taj, injured-complainant, due to his serious condition was also referred by him to Peshawar for medical treatment on the same day, but he -unfortunately expired on his way to Peshawar.

5. On the same day, i.e. the date of occurrence, accused Sikandar Shah was arrested in injured condition from a Bhaitak while running from the spot and also a .7 m.m. rifle which was having the smell of fresh discharge alongwith 20 rounds was recovered from his possession. On 16-7-1990 accused Akbar Shah also surrendered himself to the police alongwith a single barrel shotgun with 7 cartridges of .12 bore. Sikandar Shah, accused-appellant, on 16-7-1990 and Akbar Shah, accused-appellant, on 17-7-1990 made confessional statements before the learned Illaqa Magistrate.

6. The Investigating Officer during spot , inspection, took into possession blood from the respective places of the deceased and injured and also recovered two empties from the place where Sikandar Shah, accused, was allegedly present at the time of occurrence. Similarly, from the place of Akbar Shah, accused, one empty of .12 bore

was recovered. The Investigating Officer also took into possession the Bus bearing Registration No.2485/SW, in which the deceased and the injured were travelling at the time of occurrence. The Investigating Officer also prepared site plan and recorded statements of the witnesses.

The rifles recovered from the accused-appellants alongwith the empties recovered from the spot were sent to the Fire-arm Expert for opinion, who opined that the crime-empties were fired from the rifles in question. The blood-stained clothes alongwith the blood recovered from the spot were also sent for chemical analysis and the Investigating Officer received positive report in this regard.

7. At the trial, the prosecution produced 11 witnesses in support of its case. Noor Zada son of Wazir Zada (P.W.7) recorded his statement at the trial as an eye-witness of the occurrence. He in his statement charged the accused-appellants for making firing at the complainant-party, as according to him, he was also present in the same bus in which the complainant party was travelling at the time of occurrence. He also stated that some of the recoveries were also made by the police from the spot in his presence and he signed such recovery memos as a marginal witness.

The statements of the accused-appellants were also recorded under section 342, Cr.P.C. However, they refused to give statements on oath. The learned trial Judge after conclusion of the trial, awarded conviction and sentences to the appellants as detailed in the first paragraph of this judgment.

8. The points raised by the learned counsel for the appellants during the course of arguments can be summarised to the following effect:--

- (1) As to whether the testimony of P.W.7 Noor Zada, whose name does not figure in the F.I.R. as an eye-witnesses of the occurrence, could safely be relied upon for awarding capital, punishment to the appellants.
- (2) As to whether the learned trial Judge was right in placing reliance on the confessions of the two appellants only to the extent to their making firing at the deceased and injured victims, as against the established principle that confession should either be relied in toto or rejected as a whole.
- (3) As to whether the appellants could be sentenced to death even if at the time of registration of the F.I.R. as well as submission of the challan the forums under P.A.T.A. Regulation were not vested with the powers to award death sentence to an accused person .under section 302, P.P.C.

9. We have considered the arguments of the 'learned counsel for the appellants in the light of the arguments advanced by the learned counsel for the opposite side, the evidence available on record and the judgments of the superior Courts cited at the Bar.

10. The prosecution through oral evidence has fully proved the fact that Gul Taj, complainant, soon after the occurrence had narrated the occurrence to the police in the Civil Hospital at Daggar in injured condition in presence of the doctor, who not only

certified to the effect that the statement of Gul Taj was recorded in his presence, but also certified that at the time of recording his statement by the Investigating Officer, he was fully conscious and also capable to make a statement. Due to his serious condition, he was then referred to Peshawar for medical treatment but he breathed his last on the way. He in his statement has directly charged the accused-appellants by attributing specific roles of firing to both the accused. Motive for the commission of the offence was also disclosed.

P.W.7 Noor Zada was examined by the police on the same day of occurrence, wherein he disclosed similar facts of the occurrence as had been disclosed by Gul Taj, complainant, in his report. At the trial, P.W. Noor Zada supported the prosecution version on all important aspects of the case. As in his report the deceased Gal Taj had mentioned that besides him, the occurrence was also witnessed by other persons present at the spot and as there is nothing on record to suggest that P.W. Noor Zada was either closely related to the deceased or was known to him previously, therefore, the testimony of Noor Zada cannot be discarded merely on the grounds that his name has not been mentioned in the F.I.R. or there occurs some minor discrepancies in his statement, not so fatal to destroy the case of the prosecution. The argument in this regard is of no help to the defence for the reason that the statement of Noor Zada was recorded by the police on the same date of occurrence whereafter he was examined in the Court after sufficient long time and in absence of any material contradiction, the minor omission/contradiction in the statement of a witness is given less importance keeping in view the facts and circumstances of a case. The credibility of this witness has not been shaken by the defence on any particular aspect of the case. The medical as well as other circumstantial evidence in the case fully corroborates the version of the prosecution. Sikandar Shah, appellant, was arrested on the same day of occurrence while running from the spot alongwith the crime weapon. The next day of occurrence, the other accused Akbar Shah also surrendered to the police alongwith the weapon, of offence. The crime weapons alongwith the empties recovered. from the spot were sent to Fire-arm Expert for report. The report in this respect is positive. The driver of the bus has also been produced, who has admitted the occurrence to have been taken place in the manner alleged by the complainant as well as P.W. Noor Zada. The dying declaration of deceased Gul Taj and the statement of P.W. Noor Zada are, thus having every material support from the other circumstantial evidence in the case and the same being credible and worth reliance has rightly been relied upon by the learned trial Judge.

11. The accused-appellant Sikandar Shah was produced before the Illaqa Magistrate on 16-7-1990 where he recorded his statement under section 364, Cr.P.C. Similarly, Akbar Shah, accused-appellant, was produced on 17-7-1990 who made his confessional statement before the learned Magistrate. Sikandar Shah in his statement has admitted to have fired at the complainant party on 11-7-1990 and also admitted that he was apprehended on the same day from a Bhaitak where he had taken shelter in injured condition after the occurrence. The recovery of the crime weapon from him was also admitted. He, however, attributed the injuries on his person to Sarzamin, deceased (then injured) who was allegedly chasing him after the occurrence. Akbar Shah, accused-appellant, in his statement has also confessed his guilt. Sikandar Shah, accused, remained in the hospital for treatment for 5 days. According to him he only

remained in the custody of the police for one day. Similarly Akbar Shah, accused, was arrested on 16-7-1990 and was produced before the Magistrate on the following day i.e. 17-7-1990 for recording his confessional statement. Both the accused-appellants have stated nothing about any undue pressure or torture from any side. The point of attributing firing to Sarzamin at Sikandar Shah, accused appellant, has been properly dealt with by the learned trial Judge as this part of the statement of Sikandar Shah, accused, was getting no support from other ocular or circumstantial evidence available in the case. The prosecution case does not rest only on the confessions of the accused-appellants, but it also rests on other oral and circumstantial evidence, which strongly contradicts the assertion of the accused with regard to the fact that the complainant-party had also fired at the accused-appellants. The learned trial Judge, has, therefore, committed no illegality in placing reliance on that part of the confessional statements which was fully consistent with the oral and circumstantial evidence in the case and did not place reliance on that part of the statements which- was having no consistency with the evidence available on record. The authority reported in PLD 1958 Pesh. 147 can be cited with advantage to the point raised by the learned counsel for the appellants and the argument of the learned counsel for the appellants is without any force in this regard.

12. Regarding quantum of sentence that has been awarded to the appellant by the trial Court, the legality of the same has been challenged by the learned counsel for the appellants on the premises that the occurrence took place on 11-7-1990 on which date P.A.T.A. Regulation (Regulation I of 1975) was enforced in the area where the offence was committed and the trial for murder charge was to be held before a forum constituted under section 6 of the Regulation (ibid) and that on conviction, the Deputy Commissioner (exercising powers of the Provincial Government) within the contemplation of section 12 of the Regulation (ibid) could pass any sentence prescribed for the offence under the Pakistan Penal Code, 1860 except the sentence of death. Therefore, notwithstanding the trial being held after the abolition of Regulation, the trial Court has erred in awarding the death sentence to the appellant. Reference was also made to Article 12 of the Constitution of Islamic Republic of Pakistan.

Rebutting the above submissions, the learned Assistant Advocate General on the other hand submitted that the Regulation, referred to above, was declared repugnant and ultra vires to the Constitution by the august Supreme Court of Pakistan and on the date when the judgment impugned was passed the said Regulation was non-existent and hence the learned trial Judge was competent to award any sentence prescribed under the Pakistan Penal Code including death sentence. Reference was made to PLD 1989 SC 633 where sections 299 to section 338 of Pakistan Penal Code were held to be repugnant to the Injunctions of Islam and it was rule that the said finding of the august supreme Court will take effect from 23rd of March, 1990. However, as the Federal Government could not give effect to the referred judgment, a review petition was filed before the Supreme Court of Pakistan which was decided on 29-8-1990 as reported in PLD 1990 SC 1172 where the Supreme Court on accepting the review held that the rule enunciated in PLD 1989 SC 633 shall now take effect on the 12th day of Rabi-ul-Awal 1411 A.H. on which date the said provisions to the extent they have been declared and held to be repugnant to the Injunctions of Islam shall cease to have effect and if in case the required law was not enacted or enforced by the said date, the said

provisions would nevertheless cease to have effect on 12th day of Rabi-ul-Awal. It was further held that in such state of vacuum when there would be -no statute law on the subject the common Islamic Law the Injunctions of Islam as contained in the Qur'an and Sunnah relating to offence of Qatl and Jurh (hurt) shall be deemed to be the law on the subject. It was, thus, contended that in view of the finding of the august Supreme Court of Pakistan irrespective of the date of offence when it was committed, as on the date when the judgment of conviction was recorded and as no corresponding amendment introduced through Qisas and Diyat Ordinance, which was later on enacted was extended to the Provincially Administered Tribal Area, the offence of Qatl-i-Amd would be punishable under the common law i.e. the law as ordained by Holy Qur'an and Sunnah.

We would here refer to Regulation I of 1975 where under section 6 the Tribunal was to be constituted. Section 12 of .the Regulation empowers the Deputy Commissioner to impose any sentence on a convict proven guilty except the sentence of death. Regulation I of 1975 has created a special forum of the trial for the area and the powers of the Tribunal constituted thereunder had fattered and limitation to the extent that it could not award the sentence of death. The offence, however, remained punishable under section 302 of the Pakistan Penal Code which includes death sentence. The language of Article 12 of the Constitution of Islamic Republic of Pakistan is reproduced as below for convenience:--

"12 (a).--- (1) No law shall authorise the punishment of a person--

(b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed."

Our interpretation of the above sub-Article is that an offender cannot be inflicted greater penalty or a different penalty which was not prescribed when the offence was committed. However, the later part of this sub-Article would clarify the position that it relates to the punishment prescribed by law and does not deal with the power of the trial forums. Though the forum for the trial was changed by Regulation but the punishment for offence under section 302, P.P.C. remained death sentence because the Pakistan Penal Code undisputedly was extended to the Provincially Administered Tribal Area much before the promulgation of Regulation.

Thus, we are of the view that for the instant case and' cases of the nature the punishment for the offence remained as ,prescribed under the Pakistan Penal Code but due to restricted powers of the forums constituted under the Regulation, death sentence could not be awarded, however, after the Regulation ceased to have effect and after the regular Courts took cognizance of the offence under the Pakistan Penal Code, the latter applicable to the P.A.T.A. forums disappeared and the Courts constituted under the Criminal Procedure Code were, thus, vested with powers to impose any sentence prescribed by law.

13. The learned counsel for the appellants has also failed to show any mitigating circumstance in favour of the appellants for awarding them lesser penalty as against

the normal penalty of death, which has rightly be awarded to the appellants in the circumstances of the case.

14. For the aforesaid reasons, the appeal of Sikandar Shah and Akbar Shah, appellants, is hereby dismissed. The convictions recorded and the sentences imposed by the learned Sessions Judge, Bunnar at Daggar vide his judgment, dated 2-9-1997, are hereby maintained, on each count.

The Murder Reference made by the learned Sessions Judge under section 374, Cr.P.C. is, hereby answered in the affirmative and the death sentence awarded to the aforesaid appellants are hereby confirmed, on each count.

Q.M.H./M.A.K./94/P Appeal dismissed.

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