

2011 S C M R 1880**[Supreme Court of Pakistan]****Present: Mian Shakirullah Jan, Mehmood Akhtar Shahid Siddiqui and Sarmad Jalal Osmany, JJ****TARIQ MEHMOOD---Appellant****Versus****THE STATE---Respondent**

Criminal M.A. No. 282 of 2011 in Criminal Appeal No. 18 of 2009 out of Criminal Petition No. 424 of 2008, decided on 30th June, 2011.

(Against the judgment dated 14-10-2008 passed by Lahore High Court, Lahore in Criminal Appeal No. 1973 of 2002).

Penal Code (XLV of 1860)---

---Ss. 302(b), 309, 310 & 311---Criminal Procedure Code (V of 1898), S.345(5)---Qatl-e-amd (double murder case)---Fasad-fil-Arz, principle of---Applicability---Sentence, reduction in---Compounding of offence---Accused committed murder of two persons on a petty matter thus Trial Court convicted and sentenced him to death as Ta'zir which was maintained by High Court---During pendency of appeal before Supreme Court accused filed application as he had entered into compromise with legal heirs of deceased persons---Validity---Intention of accused was to do away with one deceased only with whom he had previously exchanged hot words---Subsequent death of other deceased might have been caused during scuffle between the two---Obviously the accused was running for his life because he knew that if he was apprehended by complainant party he would not be spared as he had already done to death one person---Supreme Court declined to hold the incident as either brutal or gruesome or shocking to uphold death sentence awarded to accused particularly when he had compromised the matter with legal heirs of deceased---Nothing was available on record to establish that accused had any criminal record--Supreme Court, while dismissing appeal and the application for compromise, maintained conviction awarded to accused and converted death sentence into imprisonment for life.

Mushtaq and 3 others v. The State PLD 2008 SC 1 and Abdul Jabbar and another v. The State 2010 SCMR 1231 **distinguished.**

Naseem Akhtar and another v. The State PLD 2010 SC 938 **rel.**

Raja Ghazanfar Ali, Advocate Supreme Court for Appellant.

Ch. Zubair Ahmed Farooq, A.P.-G. for the State.

Date of hearing: 30th June, 2011.

JUDGMENT

SARMAD JALAL OSMANY, J.---This Appeal impugns the judgment of the learned Lahore High Court dated 14-10-2008 in Criminal Appeal No.1973 of 2002 filed by the appellant against his conviction under section 302(b), P.P.C. and sentence of death plus fine etc. imposed upon him by the learned trial Court which was confirmed. During the pendency of this Appeal, appellant filed Criminal M.A. No.282 of 2011 for compromise of the offence as he had effected the same with the legal heirs of both the deceased. However when the appeal was listed before this Bench on 28-6-2011 we had directed Raja Ghazanfar Ali, learned Advocate Supreme Court appearing for the appellant to address us on the merits of the case as the crime appeared to be a heinous one i.e. the double murder of the two deceased on a petty matter.

2. Briefly stated the facts of the Prosecution case are that the appellant who was staying with co-accused Muhammad Arshad for the last few months had been indulging in immoral activities in the latter's house and hence the respectables of the village had asked Muhammad Arshad to evict the appellant from his house on which he had got annoyed. On 6-3-2002 the complainant's (Abdul Hafeez P.W.6) brother Muhammad Zikriya (deceased) forbade the appellant from visiting their mohallah on which he threatened the former with dire consequences. On the day of incident viz 7-3-2002 Muhammad Zikriya and Abdul Razaq (deceased) along with the complainant (their real brother) were passing in front of a barber shop owned by one Zafar. The appellant suddenly emerged at the scene and fired repeatedly with a pistol which hit Zikriya on different parts of his body and as a result he bled to death. The occurrence was also witnessed by Muhammad Ishaque (P.W.8) and Zulfiqar (P.W.7). Thereafter the appellant entered into the village still firing with his pistol when he was chased by the complainant and Abdul Razzaq. He entered into the house of co-accused Muhammad Arshad and came out with a double bared gun and started running towards the fields. He was again chased by the complainant party and after covering 1/2 a furlong Abdul Razzaq tried to catch hold of the appellant who fired at him on his left and right shoulder causing severe injuries. Abdul Razzaq also succumbed to his injuries at the spot. Then the appellant rushed towards village Saidan Wala and was chased by many villagers and ultimately he reached village Shah Inayat and was encircled by the villagers at which he started firing again which injured Abdul Rashid (P.W.4) and Adnan (P.W.5). The villagers returned the firing also causing injuries to the appellant. Allegedly co-accused Arshad and Sadiq had abetted the crime.

3. As to the merits of the case learned Advocate Supreme Court has submitted that the statement of the appellant under section 342, Cr.P.C. gives the correct picture since according to the same the appellant had come from Islamabad for purchasing Jawi crop from the village. On the night preceding the day of

occurrence he reached the village and in the morning thereafter he had gone to the fields to ease himself when he heard firing. He came out of the fields when a stray pellet also hit him whereupon he became unconscious and fell to the ground. When he gained his senses at about 4-00 p.m. he found himself in police custody. Thereafter he was medically examined and on the following day sent to judicial custody. According to the appellant Muhammad Zikriya and Abdul Razaq had been murdered by unknown persons due to enmity with one Mehmood Khan over peddling of narcotics. Since he belonged to Pathan baradri as Mehmood Khan, the complainant party involved him in order to seek revenge and concocted a false story. All the prosecution witness are of Meo bradri and are closely related inter se. Next learned Advocate Supreme Court has submitted that the crime weapons and the empties were sent together to the Forensic Science Laboratory for a test in which event the positive out come would not be of much help to the Prosecution in view of the decision of this Court in **Mushtaq and 3 others v. the State (PLD 2008 SC 1)**. Hence per learned counsel even on the merits of the case the Appeal deserves to be allowed.

4. Regarding the compromise, learned Advocate Supreme Court submits that there is nothing on the record to establish that the appellant was either a previous convict or a habitual criminal. Further more there was enmity only between the appellant and the deceased Muhammad Zikriya as according to the F.I.R. itself it was the latter who had forbidden the appellant from visiting the neighborhood. Hence, if at all, the mens rea of the appellant could only be established insofar as the case of Muhammad Zikriya is concerned. As to the subsequent death of Abdul Razaq, per learned Advocate Supreme Court, this resulted due to a scuffle between him and the appellant per the prosecution itself. Hence it cannot be said that the appellant had wilfully murdered Abdul Razaq as there is a distinct possibility that during the scuffle the shot gun held by the appellant went off killing Abdul Razzaq on the pot. Consequently it cannot be said that the principle of fasad-fil-arz as provided in section 311 of the P.P.C. could be attracted to the facts and circumstances of the case. Hence learned Advocate Supreme Court has prayed that the compromise between the legal heirs and the appellant be allowed. In this regard he has relied upon the case reported as **Abdul Jabbar and another v. The State (2010 SCMR 1231)**.

5. Learned Assistant Prosecutor-General has not supported the contentions of learned Advocate Supreme Court on the merits of the case as according to him the Prosecution has succeeded in establishing the guilt of the appellant as it was a day light occurrence and had been witnessed by a number of persons. Secondly the medical evidence on the record is completely in accord with the ocular account and the empties recovered from the scene matched the weapons recovered from the appellant.

6. We have heard both learned Advocate Supreme Court as well as the learned Assistant Prosecutor-General and also perused the record with their assistance.

7. In so far as the merits of the case are concerned, it would be seen that the parties were known to each other and this was a day light occurrence in which event there could not be any question of wrong identity. As to the ocular account

this is in three stages. Firstly the appellant gunned down Muhammad Zikriya who received multiple bullet injuries on his person. Thereafter he entered the village while still firing hotly pursued by the complainant party when he obtained a double bared shot gun from co-accused Arshad's house. In the second incident deceased Abdul Razzaq grabbed him but he, (the appellant) gunned him down by firing from his pistol and gun simultaneously. After killing Abdul Razzaq the appellant had again taken to his heels towards another village but in the meanwhile he was encircled by the villagers when there was an exchange of fire when two more P.W's. were injured. After receiving a fire-arm injury the appellant was apprehended by the police who had then arrived at the scene. The ocular account has been furnished by P.W.3 Muhammad Farooq, P.W.4 Abdur Rashid (injured), P.W.5 Muhammad Adnan (injured), P.W.6 Abdul Hafeez (complainant) and P.W.7 Zulfiqar. So also Sub-Inspector (Retired) Ahmed Ali deposed that on the day of incident he was Incharge of Police Post Kot Radha Kishan and had arrested the appellant when he was encircled by the villagers and the police party. All the P.Ws. remained steadfast in their testimonies before the learned trial Court and no dent could be made in the same under cross-examination. The ocular account has been fully corroborated by the medical evidence on the record according to which Muhammad Zikriya had received two fire arm injuries on the front of the upper and lower half of his chest which had exited on the upper and lower part of the back of the left chest. Similarly there was a fire-arm injury on the left arm which went through and through. On the same day he has also conducted the postmortem examination of deceased Abdul Razzaq who had one fire arm injury within an area of 5 x 5cm on the front side of the right chest and multiple wounds of exit on the left chest. In our opinion the injuries received by deceased Muhammad Zikriya were from bullets and those of Abdul Razzaq from shot gun pellets which correspond totally with the ocular account. Another piece of evidence is the report of the F.S.L. according to which the empties of the bullets and shot gun cartridge found at the spot matched with the shot gun and pistol recovered from the appellant at the time of his arrest. According to P.W.13 S.-I.(R) Ahmed Ali five empties of .30 bore pistol were recovered from the place where Muhammad Zikriya was lying dead and one empty of .12 bore cartridge and one empty of .30 bore pistol were recovered from where Abdul Razzaq had been murdered on the day of incident. All the empties and the weapons were sealed into two parcels and were sent to the laboratory for a test which was positive. Insofar as the case of **Mushtaq and 3 others** (supra) is concerned in our view the same is not attracted to the facts of the present case as therein empties and weapons were recovered on different dates but were sent together to the laboratory which persuaded the learned Bench to reject the positive test of this piece of evidence.

8. For the foregoing reasons we are of the opinion that the prosecution has fully proved the case against the appellant. All that can be said is that whereas the murder of deceased. Muhammad Zikriya at the hands of the appellant was intentional and pre-planned, deceased Abdul Razzaq may have died when the shot gun held by the appellant went off during a scuffle between the two i.e. his death may not have been intentional qua the appellant.

9. With regard to Criminal Miscellaneous Application No.282 of 2011 whereby the appellant has allegedly compromised the offences with the legal heirs of the

deceased, it would be seen, that as he was sentenced under section 302(b), P.P.C. to death as Ta'zir, such compromise would be covered under section 345(5) of the Cr.P.C. whereby the same is to be accepted however with the permission of the Court. In this respect it is also to be noted that per section 311 of the P.P.C. wherein punishment is given as Qisas under sections 309 and 310 of the P.P.C. the legal heirs can compound the offence. However section 311 provides that notwithstanding anything contained in sections 309 and 310 where all the legal heirs do not wave or compound the right of Qisas or the principle of Fasad-fil-arz is attracted the Court may having regard to the facts and circumstances of the case punish the offender against whom the right of Qisas has been waived or compounded with death or imprisonment for life or imprisonment of either description for a term which may extend to fourteen years but not less than ten years as Ta'zir except where the offence has been committed in the name or on the pretext of honour the punishment shall not be less than ten years. In the explanation the expression, fasad-fil-arz includes the past conduct of the offender, any previous convictions, the brutal and shocking manner in which the offence has been committed which outrageous to the public conscience, where the offence relates to honour crimes or if the offender is considered a potential danger to the community. This court has applied the principle of fasad-fil-arz even in the cases falling under section 345(5) of the Cr.P.C. where the offender/convict was not allowed to compromise the offence with the legal heirs of the deceased on the ground that he was the direct beneficiary of the crime i.e. the offence was committed with the obvious object of grabbing the property of the deceased who had done to death four persons (entire family) in a gruesome, brutal, cruel, appalling, odious, gross and repulsive manner which causes terror and sensation in the society [**Naseem Akhtar and another v. The State (PLD 2010 SC 938)**]. In the present case it would be seen as already observed that the mens rea of the appellant could only be established insofar as the deceased Muhammad Zikriya as this incident appears to be the direct outcome of the altercation between the two just one day prior to the incident. This conclusion becomes even more compelling as the appellant only targeted him. After the appellant had murdered Muhammad Zikriya he had fled he scene hotly pursued by the complainant party whereafter he obtained a double barrel shot gun from the house of co-accused Arshad and when deceased Abdul Razzaq grabbed him he (appellant) according to the prosecution shot him as well. Then the appellant fled towards another village again and this time the villagers also joined the chase when he was cornered and apprehended by the police party. In this last incident an exchange of fire took place between the appellant and the villagers during which he as well as two other P.Ws. were injured. This brief recapitulation of the entire episode would establish that the appellant's intention was to do away with Muhammad Zikriya only with whom he had previously exchanged hot words. The subsequent death of Abdul Razzaq may have been caused during the scuffle between the two. Obviously the appellant was running for his life because he knew that if he were apprehended by the complainant party he would not be spare as he had already done to death one person. In these circumstances it cannot be said that the incident in question was either brutal or gruesome or shocking which would persuade us to uphold the death sentence of the appellant particularly when he has compromised the matter with the legal heirs of the deceased. There is also nothing on the record to establish whether the appellant

has any criminal record. Consequently we, while dismissing both the appeal and the application for compromise, would convert the death sentence of the appellant to life imprisonment while maintaining the fine etc.

M.H./T-8/SC Order accordingly.

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