SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Shariat Appellate Jurisdiction]

PRESENT:

Ch.Muhammad Ibrahim Zia, C.J.
Raja Saeed Akram Khan, J.

Criminal Appeal No.11 of 2017
(Filed on 09.03.2017)

Basharat Hussain son of Muhammad Punnu, r/o Kotli Sohlan, Tehsil and District Kotli.

…. APPELLANT

VERSUS

1. Ejaz son of Karamat Khan, caste Rajput, r/o Kotli Sohlan, Tehsil and District Kotli.
2. Ansar,
3. Imdad, sons of Karamat Khan,
4. Ehsan son of Adalat,
5. Karamat son of Bashir Khan,
6. Muhammad Azam son of Said Muhammad,
7. Muhammad Younas son of Sher Khan,

8. Abdul Qadeer alias Kukar son of Muhammad Younas, caste Rajput, r/o Kotli Sohlan, Tehsil and District Kotli.

....RESPONDENTS

9. Arif Hussain, son,
10. Nasrin Akhtar,,
11. Farzana Kausar,
12. Rehana Kausar,
13. Misbah Kausar, daughters,
14. Azmat Begum widow of Muhammad Punnu, r/o Kotli Sohlan, Tehsil and District Kotli.
15. State through Advocate/Additional Advocate-General.
16. Muhammad Khalid son of Abdul Karim, r/o Kotli Sohlan, Tehsil and District Kotli.

….PROFORMA RESPONDENTS

(On appeal from the judgement of the Shariat Court dated 21.01.2017 in criminal appeal No.09, 15 and reference No.10 of 2010)

FOR THE APPELLANT: Mr.Muhammad Reaz Alam, Advocate.

FOR THE RESPONDENTS: Sh.Masood Iqbal, Advocate.

FOR THE STATE: Mr. Muhammad Zubair Raja, Addl. Advocate-General.

Date of hearing: 17.10.2018

JUDGMENT:

Raja Saeed Akram Khan, J.— The supra appeal has been addressed against the judgment of the Shariat Court dated 21.01.2017, whereby, while partly accepting the appeal filed by convict-respondent No.1, herein, the death sentence awarded to him by the trial Court has been altered into 14 years' imprisonment; the appeal filed by the complainant party has been dismissed and the reference sent by the trial Court for confirmation of the death sentence has been answered in negative.

2. The facts necessary for disposal of the instant appeal are that a case in the offences under sections 302, 337-F5, 324, 147, 148, 149, APC, and section 13 of the Arms Act, 1965, was registered at Police Station, Khoirata, on the complaint of one Muhammad Khalid son of Abdul Karim. It was alleged that on 17.02.2004, at about 02:30 pm, a *panchayat* of the respectables of the locality was convened at Kotli Sohlan Numb to resolve the dispute between Muhammad Akbar alias Mehndi and Karamat Khan regarding the passage. At the end, the members of the *panchayat* declared, Karamat Khan, at fault and asked him apologize Muhammad Akbar in the *panchayat*. On the decision, Karamat Khan became annoyed and started abusing to the members of the *panchayat*. Meanwhile, the other accused, who were present in the house of the accused, Adalat Khan, armed with lethal

weapons and sticks launched an attack on the members of the *panchayat*. The accused, Ejaz son of Karamat Khan fired which hit Muhammad Punnu at left side of his chest who fell down. The accused, Ehsan, fired which hit khurshid at his left knee. The accused, Ansar fired which hit Muhammad Yaseen at his right shoulder. The accused, Imdad, fired which hit Yasin at his right buttock. The accused, Adalat Khan, hit Muhammad Akabr with sticks at his head and the other accused raised *lalkara*s that none of the members of *panchayat* should go alive and also started firing. Muhammad Punnu died on the way to District Headquarter Hospital, Kotli. It was alleged that besides the complainant the occurrence was witnessed by Ch.Muhammad Sadiq, Mubarark Hussain, Muhammad Shabir, Muhammad Aslam and Muhammad Malik.

3. After investigation, the accused Adalat Khan, Naseem Khan, Salis, Muhammad Younas, Muhammad Shabbir, Shahbaz, Naseem and Shakeel Ahmed were released under section, 169, Cr.P.C., by the police, whereas, the accused Ejaz, Ansar, Imdad, Ehsan, Azam, Karamat, Abdul Qadeer alias Kukar, caste Rajpoot, r/o Kotli Sholan were *challaned*. The trial Court after necessary proceedings, convicted the accused Ansar under section 337 F-5, APC, and awarded him sentence of five years' rigorous imprisonment along with Rs.25,000/- as *daman* and three years' imprisonment as well as Rs.10,000/- fine in the offence under section 13 of the Arms Act, 1965. The accused, Imdad, was convicted under section 337, F-2 and was awarded the sentence of three years' rigorous imprisonment and Rs.25,000/- as *daman* and three years' imprisonment as well as

Rs.10,000/- fine under section 13 of the Arms Act, 1965. The accused, Ejaz was convicted under section 302-A, APC, and was awarded death sentence as *qisas* and three years' rigorous imprisonment as well as Rs.10,000/- fine in the offence under section 13 of the Arms Act, 1965, and he was also ordered to pay Rs.2,00,000/- to the legal heirs of the deceased under section 544-A, Cr.P.C., and in case of non-payment of fine he shall undergo for further six months simple imprisonment. The accused, Karamat, Muhammad Azam and Abdul Qadeer were acquitted of the charge by extending the benefit of doubt. The accused, Ehsan, was acquitted of the charge in the offence under section 302, APC in view of the compromise and was awarded three years' rigorous imprisonment and Rs.10,000/- as fine in the offence under section 13 of the Arms Act, 1965. The benefit of section 382-B,

Cr.P.C. was also extended to all the convicts. Feeling aggrieved convict-respondent No.1, herein, filed appeal before the Shariat Court for acquittal, whereas, the complainant party filed appeal against acquittal of some of the accused and also for enhancement of the sentences awarded to the convicts other than convict-respondent No.1. The trial Court also sent a reference to the Shariat Court for confirmation of the death sentence awarded to convict-respondent No.1. The learned Shariat Court through the consolidated impugned judgment decided the cross-appeals as well as reference in the terms as mentioned in the preceding paragraph. Against the judgment of the Shariat Court the appellant, legal heir of the deceased has filed the instant appeal.

3. Mr. Muhammad Reaz Alam, Advocate, the learned counsel for the appellant, argued that the impugned judgment is against law

and the facts of the case. He contended that the learned Shariat Court failed to appreciate the evidence brought on record by the prosecution in a legal manner. The findings recorded by the learned Shariat Court that there was no premeditation are factually incorrect as it is very much clear from the evidence brought on record that the accused party participated in *panchayat* with full preparation and as soon as the members of *punchayat* asked karamat Khan for seeking apology they started firing upon the members of *panchayat*. The learned counsel further contended that the occurrence had fully been proved from the statements of the eyewitnesses; therefore, imposition of the major penalty was requirement of law, but the learned Shariat Court failed to apply the judicial mind while converting the death sentence into 14 years' imprisonment. He

submitted that the learned Shariat Court has also not considered the corroboratory evidence available on record. He forcefully contended that convict-respondent No.1, fired a gun shot upon the deceased with the intention to kill him, the weapon of offence was duly recovered on the pointation of the convict. The convict has taken-away the life of an innocent person in a brutal manner; the occurrence is pre-planned, but all these aspects escaped the notice of the Shariat Court. The learned counsel prayed for acceptance of appeal and setting aside the judgment of the Shariat Court. The learned counsel referred to and relied upon the case law reported as *Imran and others v. State and others* [PLJ 2007 Sh.C. (AJ&K) 7], *Muhammad Khurshid Khan v. Muhammad Basharat and others* [2007 SCR 1], *Usman Khalid v. Muhammad Younas and*

another [1996 SCR 197] and *Zaffar Ali Khan v. The State* [PLD 1986 Sh.C (AJ&K) 74].

4. On the other hand, Sheikh Masood Iqbal, Advocate, the learned counsel for the convicts/accused, strongly opposed the arguments advanced by the learned counsel for the appellant. He submitted that the prosecution failed to prove the case against the respondents and it is a case of acquittal but unfortunately the convicts failed to challenge the conviction before this Court. The learned counsel while referring to the statements of the different witnesses submitted that the prosecution story is full of doubts; moreover, nothing is available on record to show that it is a pre-planned occurrence. The prosecution also failed to produce the important witnesses, Sardar Shah and Akbar alias Mehndi, in whose house the *panchayat* was convened. The other witnesses

produced by the prosecution are inter se related to each other and they mala-fide, implicated the accused in the commission of offence, even otherwise, there are many serious contradictions in the statements of these witnesses. He also added that out of the nominated accused, 8 were released by the police under section 169, Cr.P.C., against whom the same allegations were levelled, this fact itself shows that the whole story is concocted and false one. The learned counsel prayed for dismissal of appeal. He referred to the case law reported as *Mst. Fazal Begum and 2 others v. Muhammad Yasin and another* [2013 SCR 389], *Sajid Iqbal v. The State through Addl. Advocate-General Mirpur and others* [2013 SCR 1123], *Irshad Ahmed and others v. The State and others* [PLD 1996 SC 138] and *Raja Sarfraz Azam Khan and others v. State and others* [2005 SCR 166].

5. Mr. Muhammad Zubair Raja, the learned Additional Advocate-General, adopted the arguments advanced by the learned counsel for the appellant.

6. We have heard the arguments of the learned counsel for the parties and gone through the record along with the impugned judgment. According to the prosecution story, there was a dispute between Karamat Khan and Muhammad Akbar alias Mehndi, in respect of a passage and to resolve the same, a *panchayat* was convened. The members of the *panchayat* after hearing the parties declared Karamat Khan at fault and asked him to make apology, whereupon, the accused party became exasperated. They attacked the members of *panchayat* as well as Muhammad Akbar, in result of which, one member of the *panchayat* died and two other members along with Muhammad Akbar alias Mehndi were

injured. It is spelt out from the record that in F.I.R., 16 accused were nominated but later on, after investigation the police released 8 accused being innocent. The prosecution out of 23 witnesses mentioned in the calendar of *challan* produced 20 witnesses before the Court. The learned Shariat Court while handing down the impugned judgment has drawn the adverse inference that the impartial witnesses, i.e. Sardar Shah, Raja Iqbal, Raja Maqsood and Raja Mumtaz, have been withheld by the prosecution, who are respectable of the locality and as per prosecution story were present at the spot being members of *panchayat*. It may be observed here that under law it is not obligatory for the Court to draw adverse inference in each and every case and sole discretion in this regard lies with the Court to decide according to the facts of each case. In the instant case, the record reveals

that the prosecution neither produced some of the injured as witness, nor the members of *panchayat*, as pointed out by the learned Shariat in the impugned judgment, were cited as witness, whereas, keeping in view the circumstances of the case, these witnesses were most natural and material witnesses of the occurrence. In such state of affairs, we are satisfied that the learned Shariat Court while drawing the adverse inference has exercised the discretion judiciously; as according to the statutory provision i,e Illustration (G), of Article 129, of the Qanoon-e-Shahadat Order, 1984, if the available evidence is not produced by a party, it can be presumed that the same has been withheld due to being not supportive to such party. In this regard, reference may be made to a case reported as *Muhammad Shabir vs. The State* [2003 SCR 486], wherein it has been observed that:-

> "5. .....We agree that it is not mandatory for the prosecution to produce all the witnesses cited by it in the calendar of witnesses. However, if a material witness is withheld then the presumption can be taken against the prosecution that such witness if produced would have not supported the case of the prosecution. ....."

7. The main thrust of the arguments of the learned counsel for the appellant is that it is a pre-planned occurrence, but the learned Shariat Court wrongly altered the death sentence awarded to convict-respondent No.1, by the trial Court, into 14 years' imprisonment on the ground that there was no premeditation. To appreciate this aspect, we have minutely examined the record. It is an admitted fact that the dispute regarding a passage was among Muhammad Akbar alias

Mehndi and the accused party, and no enmity existed between the deceased and the accused party rather the deceased was member of *panchayat,* who tried to resolve the dispute, therefore, from the plain reading of the prosecution story it is obvious that it cannot be said that there was any plan of the accused party to kill the deceased. Although, from the prosecution story, premeditation to kill the deceased does not appear, however, to reach the right conclusion, we have examined the statements of the eyewitnesses carefully. According to the prosecution story, the *panchayat* was convened in the house of Muhammad Akbar alias Mehndi, whereas, the accused were gathered in the house of one of the accused, Adalat Khan, with the intention to attack the opposite party. The complainant while recording his statement has not supported this part of the story in clear terms.

The relevant portion of his statement reads as under:-

"عدالت ملزم کا گھر مہندی کے گھر سے اوجھل ہے۔ مظہر نے ملزمان کو عدالت کے گھر بیٹھے نہ دیکھا تھا۔ البتہ وہاں سے نکلتے ہوئے انہیں دیکھا تھا۔ مظہر یہ بھی نہیں بتا سکتا کہ ملزمان عدالت کے گھر کس وقت سے بیٹھ کر کیا مشورہ کر رہے تھے۔"

The eyewitness, Muhammad Shabir, stated in his statement that:

"مظہر کو وقوعہ سے قبل متوفی پنوں اور عدالت و اکبر کے مابین کسی دشمنی کا علم نہ ہے---------- مظہر مہندی کی برادری سے ہے اور اُسکا رشتہ دار بھی ہے۔ یہ غلط ہے کہ مظہر نے رشتہ داری کی بناء پر ملزمان کے خلاف شہادت دی ہے۔ یہ غلط ھیکہ ملزمان کے ساتھ مظہر کی دشمنی تھی جس بناء پر اُن کے خلاف مظہر نے شہادت دی ہے۔ مظہر نے ملزمان کو عدالت کے مکان کے اندر مسلح حالت میں نہ دیکھا تھا۔ جب باہر آئے تو دیکھا تھا۔ مظہر نے ملزمان کو مسلح حالت میں عدالت کے مکان کے اندر جاتے ہوئے نہ دیکھا تھا۔ مظہر نے مہندی کے صحن سے ملزمان کو دیکھا تھا۔ ملزمان کو مظہر نے عدالت کے صحن سے گزرتے ہوئے دیکھا تھا۔"

Muhammad Sadiq, witness, while recording his statement deposed that:-

"پنوں اور ملزمان کی آپس میں کوئی دشمنی نہ تھی۔ ----- یہ غلط ھیکہ مہندی کے گھر سے حاجی عدالت کے گھر آدمی نظر نہ آتا ہے۔ مظہر نے کسی ملزم کو حاجی عدالت کے گھر بیٹھے ہوئے نہ دیکھا تھا۔"

The eyewitness, Muhammad Yasin, while recording his statement deposed that:

"یہ درست ھیکہ اس پنچائت میں راجہ مقصود، راجہ ممتاز چئیرمین ، راجہ اقبال اور سردار شاہ بھی موجود تھے۔ یہ درست ھیکہ ان لوگوں کو گواہ نہیں رکھا گیا--------- صوبیدار اور پنوں ا ور ملزمان کی آپس میں کوئی دشمنی نہیں تھی۔"

The other eyewitness, Mubarak Hussain, stated that:

"ملزمان میں سے پنچائت میں کوئی شامل نہ تھا۔ پنچائت میں فیصلہ ہوا تھا کہ کرامت کو راستہ ملے گا لیکن اس شرط پر کے اگلے دن کرامت اور مہندی کی جو بول چال ہوئی تھی اسکی کرامت مہندی سے معافی مانگے گا۔ ------ پنچائیت تقریباً 5/4 گھنٹے بیٹھی رہی۔ پنچائیت نے روٹی مہندی کے گھر سے ہی کھائی تھی۔ جو ڈیڑھ بجے کھائی تھی۔ پھر دو بجے مسجد میں جا کر نماز پڑھی تھی۔ مسجد عدالت خان کے گھر کے قریب ہے۔ عدالت بھی مسجد میں موجود تھا جس نے نماز کے بعد اپنے گھر چائے پلائی تھی۔ پنچائیت والوں کے علاوہ دیگر لوگوں نے بھی چائے پی تھی۔ پھر کہا کہ چائے سب نے نہ پی تھی بلکہ نماز سب نے پڑھی تھی۔ فیصلہ پنچائت نے نماز پڑھنے اور چائے پینے کے بعد مہندی خان کے گھر آکر سنایا تھا۔ چائے پینے کے 10/15منٹ بعد مہندی خان کے گھر آکر فیصلہ سنایا تھا۔ جب ہم نے حاجی عدالت کے گھر چائے پی تو اس وقت عدالت خان کے گھر کے افراد کے علاوہ ملزمان بھی وہاں موجود تھے جن میں عنصر ، اعجاز اور امداد موجود تھے۔ احسان بھی وہیں تھا جو کہ اُسکا وہی گھر تھا۔ چائے پیتے وقت مظہر نے ملزمان کے پاس اسلحہ نہ دیکھا تھا۔ ----------یہ درست ھیکہ ملزمان کی پنوں کیساتھ دشمنی نہ تھی۔"

After going through the statements of the eyewitnesses, it is clear that all the witnesses are unanimous on the point that the accused party had no enmity with the deceased. It also appears from the statements that the occurrence took place on the spur of the moment and there was no premeditation. Thus, the argument of the learned counsel for the appellant that it is proved from the statements of the witnesses that it is a pre-planned occurrence and the Shariat Court failed to analyze the same has no substance. We would like to observe here that when it is proved even from the statements of the eyewitnesses that the convicts/accused had no enmity with the deceased and the occurrence took place in the result of sudden provocation, then in view of the overall circumstances of the present case, the imposition of major penalty is not safe. As in the instant case, the

element of pre-meditation is missing, therefore, this aspect may be considered as mitigation. Reference may be made to a case reported as *Matiullah and another vs. The State and another* [2010 P.Cr.L.J. 676], wherein, it has been held that:-

> "17. No doubt that in case of proof of qatl-e-amd against accused, the normal penalty is death sentence but in this case, the complainant has neither mentioned nor proved any previous blood feud or enmity of murder from either side to compel the accused-respondents for taking the revenge of any murder from their side and the murder of Akhtar Munir could be the result of sudden provocation at the spur of moment when Habibullah promoted the accused-respondents to kill the deceased, therefore, being not pre-meditated murder at the hands of accused-respondents will be considered a

> mitigating circumstance in favour of accused-respondents, therefore, the revision petition being without any substance is hereby dismissed."

8. The learned counsel for the appellant during the course of arguments also emphasized that the ocular account is fully corroborated with the other pieces of evidence and the findings recorded by the Shariat Court that some mitigating circumstances are available in the case, are against the record. After scrutinizing the statements of the witnesses, it appears that some material contradictions are available in the same, as the complainant said that the house of accused, Adalat Khan, is not seen from the house of Mehndi, where the *panchayat* was convened, whereas, the other eyewitnesses stated otherwise. The complainant implicated 16 accused in the occurrence, but the other eyewitnesses do not support this version of

the complainant and the police after investigation also released 8 accused being innocent. The complainant stated that at the time of occurrence the convicts, Ejaz, Ansar, Imdad and Ehsan were armed with rifles and Adalat Khan was armed with stick, whereas, one of the eyewitnesses, Mubarak Hussain, categorically stated in his statement that he was present at the spot but except convict, Ejaz, he did not see the weapons in the hands of any other accused. Moreover, the learned Shariat Court has also rightly pointed out in the impugned judgment that after a considerable delay of more than 9 hours F.I.R. has been registered, for which no reasonable explanation has come on the record and the prosecution story has not corroborated by the report of Chemical Examiner. In such scenario, the version of the learned counsel for the appellant that mitigating circumstances are

not available in the case, is also ill-founded. In the case in hand, the conviction has not been challenged before this Court by the convict-respondents, therefore, we do not intend to examine; whether the same is justified or not, however, in our view, convict-respondent No.1, does not deserve for the normal penalty of death or life imprisonment as the standard of evidence required for awarding such penalties is missing in the case in hand. Thus, in view of the mitigating circumstances discussed hereinabove and in the preceding paragraph, the learned Shariat Court has rightly altered the death penalty awarded to convict-respondent No.1, into 14 years' imprisonment and refused to enhance the sentences awarded to the other convicts by the trial Court. The case law referred to by the counsel for the appellant is not applicable in

the instant case being dissimilar facts and circumstances.

Consequently, the impugned judgment stands upheld and this appeal being devoid of any force is hereby dismissed.

Mirpur, **JUDGE** **CHIEF JUSTICE**
_.10.2018

Approved for reporting.

JUDGE