

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.25 of 2019
(Filed on 18.04.2019)

1. Waqas Abid,
2. Bilal Abid, sons,
3. Riaz Bi, widow,
4. Zakia Abid,
5. Sadaf Abid, daughter of Abid Hussain,
6. Shamim Akhtar widow,
7. Atif Ayub,
8. Nida Ayub,
9. Saiqa Ayub daughter of Muhammad Ayub, caste Jatt, r/o Mora Khatyal Oneh Dadyal, now residing new City Dadyal, Tehsil Dadyal, District Mirpur.

....COMPLAINANT-APPELLANTS

VERSUS

1. Sajid Hussain son of Muhammad Younas now detained in Central Jail Mirpur.
2. Robina Qadeer w.o Sajid Hussain, caste Jatt, r/o Gorah Nawan Mozia Onah, Tehsil Dadyal.

....RESPONDENTS

3. The State through Advocate-General.
4. Zainab Bi mother of Ayub, r/o Mora Khatyal Dadyal.

....PROFORMA RESPONDENTS

(On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 08.04.2019 in criminal appeals No.103 and 114 and reference No.99 of 2017)

FOR THE APPELLANTS: Mr. Abdul Wahid Amir, Advocate.

FOR THE RESPONDENTS: Mr. Riaz Naveed Butt, Advocate

FOR THE STATE: Raja Inamullah Khan Advocate-General.

Criminal Appeal No.38 of 2019
(Filed on 24.05.2019)

Sajid Hussain son of Muhammad Younas, caste Jatt, r/o Gurah Nowana Mozia Tehsil Dadyal, District Mirpur, presently prisoner in Central Jail Mirpur.

.... CONVICT-APPELLANT

VERSUS

1. Mst. Zainab Bi (mother)
2. Mst. Shamim Akhtar (widow),
3. Atif Ayub,
4. Faraz Ayub, sons,
5. Saiqa ayub,
6. Nida Ayub,
7. Khola Ayub, daughters of deceased Muhammad Ayuyb,
8. Mst. Riaz Bi, widow,
9. Waqas Abid,
10. Bilal Abid, sons,
11. Ghazala Abid,
12. Shamila Abid,
13. Zakia Abid,
14. Sadaf Abid, daughters of deceased Muhammad Abid, caste Jatt, r/o Mohara Khatian, Tehsil Dadyal, District Mirpur.
15. The State through Advocate-General.

....RESPONDENTS

(On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 08.04.2019 in criminal appeals No.103 and 114 and reference No.99 of 2017)

FOR THE APPELLANT: Mr. Riaz Naveed Butt,
Advocate.

FOR THE RESPONDENTS: Mr. Abdul Wahid
Amir, Advocate.

FOR THE STATE: Raja Inamullah
Khan Advocate-
General.

Date of hearing: 10.02.2020

JUDGMENT:

Raja Saeed Akram Khan, J.— The common judgment of the Shariat Appellate Bench of the High Court (High Court) dated 08.04.2019, whereby the appeal filed by the convict-appellant, has partly been accepted; the cross appeal filed by the complainant-appellants has been dismissed and the reference sent by the trial Court for confirmation of the death sentence awarded to the convict by the trial Court has been

answered in negative, has been called in question in the appeals supra. As the titled appeals are outcome of one and the same occurrence and the judgment, hence, these are being disposed of through this single judgment.

2. The concise facts involved in the case are that on 01.06.2010, the complainant, Muhammad Afzal lodged an application at Police Station Dadyal for registration of the case against the convict-appellant and the co-accused, stating therein, that at 8:00 am, he was sitting at his petrol pump situate at Amb when Master Muhammad Ayub son of Abdullah along with Abid Hussain son of Jahandad, residents of Mohra Khatial, came there and told him that Abid Hussain running the business of air tickets, from whom, Sajid Hussain son of Muhammad Younas had purchased two air tickets for England but the

payment is still outstanding and they are going to receive the due amount. They asked him as well as Muhammad Shafique and Farooq Shahid, who were also present there to accompany them, whereupon, the complainant consented to follow them in his own vehicle. When Muhammad Ayub and Abid Hussain followed by the complainant reached Gorha Nawan near to the under construction house of Muhammad Younsaf, they found Sajid Hussain, his father, Muhammad Younas and a woman standing in the way. The accused, Sajid Hussain stopped the vehicle of Muhammad Ayub and asked him that you had come to get the money; whereupon, Muhammad Ayub, standing outside the vehicle, told Muhammad Younas that they himself had called them for collecting money. On this, the accused, Sajid Hussain, while making query as to who will receive the money open the fire with pistol at

Muhammad Ayub, which hit him at his chest and he fell to the ground. In the meantime, Abid Hussain alighted from the vehicle and tried to rescue himself but the accused, Sajid Hussain, fired a shot at him who also fell to the ground after sustaining injuries. The accused, Sajid Hussain repeated 2/3 more shots consecutively at Abid Hussain, whereas, Muhammad Younas and the woman raised a *lalkara* that no one should go alive. The occurrence has also been witnessed by Farooq Shahid and Muhammad Shafique. The motive behind the occurrence was stated to be a dispute over a piece of land. On this report, a case in the offences under sections 34 and 302, APC was registered. The police on the conclusion of the investigation presented the *challan* in the Additional District Court of Criminal Jurisdiction Daydal in the offences under sections 34 and 302, APC read with

section 14 Offence Against Property (Enforcement of Hudood) Act, 1985 and section 13 of the Arms Act, 1965. During the course of trial, one of the accused, Muhammad Younas died, whereupon the proceedings to his extent went to stop. The trial Court after necessary proceedings vide its judgment dated 05.08.2017, acquitted the accused, Robina Qadeer, of the charge while extending her the benefit of doubt and convicted the accused, Sajid Hussain and awarded him the death sentence in the offence under section 302 (b), APC and 3 years' simple imprisonment along with fine of Rs.10,000/- in the offence under section 13 of the Arms Act, 1965 and in default of payment of fine further imprisonment for 3 months was awarded to him and under section 14 of the Offence Against Property (Enforcement of Hudood) Act, 1985, 3 years' simple imprisonment was also

awarded to him. He was also ordered to pay rupees 10 lac each as compensation under section 544-A Cr.P.C., to the heirs of both the deceased. Both the parties went in appeals before the High Court against the judgment of the trial Court. The complainant party filed appeal against the acquittal order passed in favour of co-accused, Robina Qadeer, whereas, the convict filed appeal for acquittal and the trial Court also sent a reference for confirmation of the death sentence. The learned High Court through the impugned judgment decided the appeals as well as the reference in the terms indicated in the preceding paragraph, hence, these appeals.

3. Mr. Riaz Naveed Butt, Advocate, the learned counsel for the convict-appellant argued that the impugned judgment is against law and the facts of the case. He contended that the case against the convict is full of

doubts and it is well settled principle of law that a slightest doubt is sufficient to acquit the accused of the charge but the Courts below failed to appreciate the record and the relevant law on the subject. He added that in the instant case, during the course of trial, a number of times the complainant was summoned to get his statement recorded but he did not appear before the Court and died without recording the statement which creates a serious doubt in the prosecution story. He added that it is a blind murder and the convict-appellant has been enroped in the case by letting off the real culprit. In the instant case, only the related witnesses have been produced before the Court and there are major contradictions in their statements which have not been considered by the Courts below. He submitted that the recovery is also fake and no independent person of the locality has been

associated. The pistol allegedly recovered on the pointation of the convict according to the report of Forensic Science Laboratory was not in working condition; therefore, the report clearly contradicts the prosecution's version. In the case in hand, a motive has been established but the prosecution failed to prove the same and under law once a motive is established then it is duty of the prosecution to prove the same. He added that the Courts below disbelieved the evidence brought on record to the extent of co-accused but astonishingly on the basis of the same set of evidence convicted the appellant which is against the settled norms of justice. The prosecution story that on the call of the accused party the deceased along with others went to collect the outstanding amount against sale of air ticket but instead of making payment they murdered them, is not

believable. In absence of any threat or the apprehension from the accused, there was no occasion for the deceased to accompany a number of persons just to receive the money. He submitted that the place of occurrence is also disputed as after the occurrence when police reached there was no dead-body found at the spot and the same were later on, recovered from a car and one of the deceased was still lying on the driving seat, whereas, the story as narrated by the prosecution appears to be quite otherwise. He added that around the place of occurrence there is number of houses but no one from the locality has been cited as witness. The manner of occurrence is also disputed which creates a doubt in the prosecution story. The learned counsel referred to the different parts of the statements of the witnesses and submitted that there are serious contradictions in the

statements of the witnesses which cannot be ignored. The learned counsel referred to and relied upon the case law reported as *Akhtar Ali and others v. The State* [2008 SCMR 6], *Tanvir alias Rabail and another v. The State* [2012 YLR 2016], *Imtiaz alias Taj v. The State* [2018 SCMR 344] and [2019 SCR 105] and prayed for acquittal of the convict.

4. On the other hand, Raja Inamullah Khan, Advocate-General and Mr. Abdul Wahid Aamir, Advocate, strongly controverted the arguments advanced by the learned counsel for the convict. They also argued that the impugned judgment is against law and the facts of the case. The prosecution through direct as well as corroboratory evidence proved the case beyond any shadow of doubt but the trial Court without any justification acquitted the co-accused of the charge and the learned High Court instead of rectifying the

illegality committed by the trial Court altered the death sentence awarded to the convict by the trial Court into life imprisonment. He maintained that the co-accused along with convict was found present at the spot and she instigated the convict for the commission of offence, but this aspect of the case escaped the attention of the Courts below. He submitted that it is a preplanned occurrence, FIR has been lodged promptly, the accused have duly been nominated with specific role and the case has been proved beyond the shadow of doubt. They contended that the Courts below at one hand have recorded the findings that the prosecution proved the case by producing direct evidence but on the other hand, decided the case otherwise which is not permissible under law. They contended that the direct evidence is fully corroborated by the recoveries as well as medical reports and no

contradiction in the evidence brought on record by the prosecution has been pointed out by the defence. They further submitted that the prosecution produced two male eyewitnesses, who had been found *adil* during purgation; therefore, non-appearance of the complainant before the Court is not fatal for the case of the prosecution. They contended that the presence of the eyewitnesses at the place of occurrence is very much natural as on the fateful day they were going to their routine jobs and when they reached the petrol pump one of the deceased requested them to accompany them, whereupon, they went along with them. They submitted that the FIR was promptly lodged and there is no possibility of consultation, moreover, the complainant as well as the eyewitnesses had no enmity with the accused persons to falsely implicate them in the commission of offence. The seats of

injuries as shown in the medical report are in line with the statements of the witnesses. The argument of the learned counsel for the convict that the dead-body of one of the deceased was recovered from the driving seat of the vehicle is baseless as the same was recovered from the front seat and not from the driving seat; however, his head was bent towards the driving seat of the vehicle. They forcefully contended that the dead-bodies have been recovered on the pointation of the convict and the recovery of blood stained cloths and the key of the vehicle further corroborated the prosecution story. They contended that the argument of the learned counsel for the convict in respect of the site plane is also against the record even otherwise the site plane is not a substantive piece of evidence and in presence of direct evidence the same can be ignored. Regarding the

motive they referred to the statement of one Khadim Hussain and submitted that the same has been proved by producing cogent evidence. They referred to and relied upon the case law reported as *Azhar Aziz v. State* [PLJ 1996 SC (AJK) 257], *Muhammad Qasim and another v. The State* [1997 P.Cr.L.J. 1095], *Muhammad Khurshid Khan v. Muhammad Basharat and another* [2007 SCR 1], *Muhammad Tahir Aziz v. The State and another* [2009 SCR 71] and *Sheikh Javed Iqbal v. Muhammad Bashir and 5 others* [2010 SCR 208] *Muhammad Yar alias Yari v. The State* [2001 MLD 807], and prayed for setting aside the impugned judgment and award of death sentence as *qisas* to the convict and also for the conviction of the co-accused.

6. We have heard the arguments and gone through the record along with the impugned judgment and also considered the

case law referred to by the learned counsel for the parties. The first argument forcefully advanced by the learned counsel for the convict is that the complainant of the case remained alive more than 16 months after the occurrence but despite summoning a number of times by the Court, he did not appear to record his statement which creates a serious doubt in the prosecution story. This argument is not convincing in nature as the FIR is just an information and the only object of the same is to bring the law into motion; hence, mere on the sole ground of nonappearance of the complainant before the Court the whole case of the prosecution cannot be declared doubtful. Another argument of the learned counsel for the convict was that the place of occurrence is also disputed as the dead-bodies were recovered from a different place than the place alleged in the FIR. It may be stated that

according to the prosecution story, during the course of investigation the convict himself stated that he shifted the dead-bodies from the place of occurrence by loading the same in a vehicle. As on the pointation of the convict the dead-bodies were recovered from the vehicle, moreover, the recovery of blood stained cloths and key of the vehicle on the pointation of the convict further supports the prosecution version. Thus, this argument of the learned counsel for the convict is also not of worth consideration.

7. To appreciate the argument of the learned counsel for the convict that the prosecution failed to prove the motive, we have examined the record carefully. The perusal of the record shows that in the FIR the motive has been shown as a dispute over a piece of land. The relevant portion of the FIR reads as under:-

"اصل میں وجہ عناد تنازعہ اراضی ہے۔"

The perusal of the evidence brought on record shows that one of the witnesses which admittedly is the relative of both the parties, i.e., Khadim Hussain, appeared before the Court and while recording his statement deposed that 2/3 days prior to the occurrence in his presence a dispute regarding the land was negotiated between the convict and the deceased persons, whereupon, the convict had become annoyed. The relevant portion of his statement is reproduced here which reads as under:-

"مورخہ 28.05.2010 تقریباً پانچ بجے مظہر ماسٹر ایوب مقتول کے گھر گیا۔ مظہر کے جانے سے پہلے وہاں پر ماسٹر ایوب، عابد حسین، محمد بشیر، محمد یونس اور ملزم حاضر عدالت ساجد حسین بیٹھے ہوئے تھے۔ مظہر جب وہاں پہنچا تو مظہر کے پہنچنے سے قبل وہ گوڑاناون کے ملکیتی رقبے شاملات اور معاوضہ جات کے متعلق باتیں کر رہے تھے۔ باتوں باتوں میں ماسٹر محمد ایوب اور عابد حسین نے کہا کہ ہمارے مکان منگلا ڈیم اپ ریزنگ میں آگئے ہیں لہذا ہم اپنا گھر گوڑاناون میں اپنے ملکیتی رقبے میں

بنائیں گے اور کچھ جگہ مسجد اور کچھ جگہ قبرستان کے لئے وقف کریں گے تو محمد یونس اور ساجد حسین ملزم کو یہ بات پسند نہ آئی اور وہ غصے کی حالت میں کہنے لگے کہ یہ کیسے ہو سکتا ہے کہ ہم ساٹھ / ستر سال سے یہاں رہ رہے ہیں۔ یہ سارا رقبہ ہمارا ہے تو ماسٹر ایوب اور عابد حسین نے کہا کہ ہم محکمہ مال کے ریکارڈ کے مطابق اپنے ملکیتی رقبے پر مکان، مسجد اور قبرستان بنائیں گے تو ملزم محمد یونس اور ساجد حسین غصے کی حالت میں وہاں سے چلے گئے اور دو تین دن بعد یہ واقعہ کر دیا۔"

The aforesaid part of the statement of the witness has not been cross-examined, thus, it cannot be said that the prosecution failed to prove the motive.

8. The learned counsel for the convict forcefully submitted that the eyewitnesses are related witnesses and no independent person has been cited as witness, therefore, on the strength of the statements of the related witnesses the conviction cannot be recorded. This argument is also not convincing in nature as nothing is available on record to show that the witnesses ever had any enmity towards the convict to falsely implicate him in the

commission of offence and it is settled principle of law that mere on the ground of relationship the testimony of the witnesses cannot be discarded when no ill-will or animosity of the witnesses against the accused comes on the record. There is a plethora of judgments on the point, for instance reference may be made to a case reported as *Qadir Bakhsh and others v. The State through Shoukat and others* [2013 SCR 439], wherein while dealing with the proposition it has been held that:-

“9.It is a celebrated principle of the appreciation of evidence that mere relationship of witnesses inter se or to the deceased is not sufficient to discredit outrightly their testimony if otherwise such witnesses are found to be the witnesses of truth but if the independent and impartial witnesses are available and they are not

produced and withheld and only the related witness whose testimony is not confidence-inspiring, are produced, the testimony of such witnesses cannot be relied upon without independent corroboration and the corroboration shall be of such a standard which tends to satisfy the court that the witnesses have spoken the truth.”

As in the instant case it is not the version of the defence that the eyewitnesses had any enmity with the convict to falsely implicate him in the commission of offence, hence, this argument cannot be accepted.

10. In the light of the afore-discussed facts and circumstances of the case, it becomes clear that the prosecution has proved the motive and the recoveries made on the pointation of the convict further corroborate the prosecution story; thus, in such state of affairs, we do not agree with the version of the

learned counsel for the convict that it is a case of no evidence and the convict has falsely been implicated. However, in view of the prosecution story one thing clicks in our mind that when the father of the convict himself called the deceased for payment of the outstanding amount of air tickets, regarding which admittedly there was no dispute between the parties, then the company of a large number of the persons just to collect the amount, does not seem appealing in nature. The alleged eyewitnesses appear to be the chance witnesses and for a chance witness the important factor is reasonable explanation for his presence at the place of occurrence which is missing in the case in hand. This Court in a case reported as *Muhammad Khurshid Khan v. Muhammad Basharat and another* [2007 SCR 1] has held that if a chance witness reasonably explains his presence at the place of

occurrence then the statement of such witness can be considered along with other circumstantial evidence. The relevant portion of the case law (supra) reads as under:-

"21. It is pertinent to note that while appreciating the evidence of a chance witness, the Court should be cautious and it should ensure that the statement of chance witness finds corroboration from other evidence. The evidence of chance witness should be scrutinized very carefully but it does not mean that his testimony should be acted upon only if the same is corroborated by independent evidence. If the testimony of chance witness finds corroboration from any other circumstance or from any other evidence in the form of recoveries and medical evidence, then that can be relied upon. This view finds support from

Abdul Rushid and others v. Abdul Ghafar and others [2001 SCR 240] wherein it has been held as under:—

‘It is correct that the testimony of a chance witness should be carefully scrutinized but that does not mean that his testimony should be acted upon only if the same is corroborated by independent evidence. However, it may be observed that in the instant case, there is also corroborative evidence in form of recoveries and medical evidence.’

It would be also useful to mention here that if a chance witness reasonably explains his presence at the place of occurrence and states about the occurrence in such a way that it inspires confidence and it is also corroborated by any other evidence or circumstances, then the same can be considered along with the other circumstantial evidence. This view finds support from *Iqbal*

v. State [PLJ 1988 Cr.C. (Lah.) 522]
wherein it has been held as
under:—

‘..... The presence of this witness at the spot and his witnessing the occurrence on the fateful night, therefore, was sheer chance and it can conveniently be said that he was a chance witness but his statement cannot be brushed aside simply on this point alone. If a chance witness reasonably explains his presence at the spot and renders narration of the occurrence in such a way that the same inspires confidence and it was further supported by the evidence, which materially corroborates such version then the same can be considered along with other incriminating evidence.’”

In absence of any threat/apprehension or the possibility of the quarrel between the parties there was no occasion for accompanying the

deceased by the eyewitnesses and the only version of the eyewitnesses; that they were going to their routine jobs and on the request of the deceased they accompanied them, is not satisfactory, as why the request was made without any justification, in this regard no plausible explanation is available on record. Although, in the case in hand, the circumstances connect the convict with the commission of offence, as has been observed earlier, but it appears that by making improvements, an attempt has been made to convert the case of circumstantial evidence into a case of direct evidence which made the case contaminated. It may be observed here that when a case is presented as a case of direct evidence then the same should be proved through the direct evidence but in the instant case strong mitigation has been found in respect of the presence of the eyewitnesses.

There are also contradictions in the statements of the witnesses; one of the eyewitnesses, Farooq Shahid, stated in his statement that immediately after the occurrence when they were in the way to the police station, a bike rider met them who informed them that the injured have been passed away. The relevant portion of his statement reads as under:-

"مقتولین کے فوت ہونے کا اُس وقت پتہ چلا جب ہم تھانہ جا رہے تھے اور راستہ میں ایک موٹر سائیکل والا آیا جس نے مقتولین کے بارے میں بتایا کہ وہ فوت ہو گئے ہیں۔ موٹر سائیکل والا آدمی افضل صاحب کے پٹرول پمپ سے پیچھے جانب مشرق ملا تھا۔ مظہر اُس موٹر سائیکل والا کو نہ جانتا ہے۔"

Whereas, the other eyewitness, Muhammad Shafique, stated in his statement that when after the occurrence they were in the way to the police station, someone through telephonic call informed the complainant that the injured have been died. The relevant portion of his statement reads as under:-

"جب جائے وقوع سے واپس تھانہ جارہے تھے تو سلطانیہ پٹرول پمپ کے پاس محمد افضل ولد عبدالرحیم کو فون آیا تو پتہ چلا کہ مضر وہان مقتول ہو گئے ہیں۔ علم نہ ہے کس نے فون کر کے بتایا تھا کہ فوت ہو چکے ہیں۔ جائے وقوع سے آتے ہوئے وہاں بھی کوئی گواہ نہ چھوڑ آئے تھے۔"

In view of no explanation in respect of the presence of the witnesses at the place of occurrence as well as the contradictions in their statements, it can safely be said that the direct evidence brought on record by the prosecution is not of such standard on the basis of which the major penalty can be awarded to the convict. Moreover, according to the report of Forensic Science Laboratory the pistol allegedly recovered on the pointation of the convict was not in working order which can also be considered as a mitigating factor. The co-accused has been acquitted of the charge by the trial Court while extending her the benefit of doubt and after examining the record we also concur with the opinion formed by the Courts below to her extent.

The crux of the above discussion is that neither it is a case of acquittal nor the standard required for awarding the normal penalties provided under law, is available in the case in hand; hence, we partly accept the appeal filed by the convict and alter the sentence of life imprisonment awarded to him by the High Court into the sentence already undergone. Except this modification, the impugned judgment stands upheld. The cross appeal filed by the complainant-appellants being devoid of any force is hereby dismissed.

Mirpur,
20.02.2020

JUDGE

CHIEF JUSTICE

Waqas Abid & others v. Sajid Hussain & others
Sajid Hussain v. Mst. Zainab Bi & others

ORDER:-

The judgment has been signed. The same shall be announced by the Addl. Registrar Branch Registry Mirpur after notifying the learned counsel for the parties.

Mirpur,
20.02.2020

CHIEF JUSTICE

JUDGE