JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT
ISLAMABAD

CASE NO. : CRIMINAL APPEAL NO.203-2018
Tasawar Hussain
Vs.
The State
CASE NO. : MURDER REFERENCE NO.13-2018
The State
Vs.
Tasawar Hussain
CASE NO. : JAIL APPEAL NO.216-2018
Tasawar Hussain
Vs.
The State

Appellant by : Mr. Jan Muhammad Khan, Advocate
Respondents by : Hafiz Muhammad Atif Khokhar, Advocate
Mr. Majid Rasheed Khan, State Counsel
Date of hearing : 03.06.2021

AAMER FAROOQ J. This judgment shall decide the above mentioned Criminal Appeal as well as Murder Reference No.13-2018 along with Jail Appeal No.216-2018, as they arise out of the same judgment dated 15.11.2018 passed by the District and Sessions Judge, Islamabad-East.

2. Tasawar Hussain (the appellant) was convicted in case FIR No.237 dated 21.08.2014 for offences under sections 302/324 & 337-A(ii) PPC registered with Police Station, Bhara Kahu, Islamabad; he was awarded death sentence with respect to offence under section 302 PPC along with compensation in the sum of Rs.1,00,000/- as well as fine of Rs.1,00,000/- and in default thereof, to undergo Simple Imprisonment for a period of three months each and sentence of ten years R.I. for offence under section 324 PPC.

3. The case of the prosecution is that on the complaint of one Shakir Hussain, above mentioned FIR was registered against the appellant, wherein it was alleged that on 21.08.2014 at about 5:30 p.m., the appellant murdered complainant's father and injured his mother by firing shots at them with .30 bore pistol. It was also alleged that motive, for the murder, was that the appellant, who was the son-in-law of the deceased, wanted a share in the property, which was denied by the deceased.

4. The prosecution, in order to prove its case, produced three witnesses which gave the ocular account of the incident namely Shakir Hussain, the complainant (PW-6), Mst. Rukhsana Bibi (PW-7), who was also injured by the appellant and Pervaiz Akhtar (PW-8), maternal uncle of the appellant. The doctor, who conducted the post-mortem, appeared as PW-5, whereas Investigating Officer Muhammad Riaz, SI appeared as PW-12; other police witnesses of recovery and other aspects were also produced by the prosecution.

5. The appellant tendered his statement under section 342 Cr.P.C. and also appeared as a witness under section 340 (2) Cr.P.C.

6. In the documentary evidence, FIR was exhibited as Ex.PL, application for registration of FIR Ex.PF, application for post-mortem Ex.PB/1, inquest report Ex.PB/2, Medico Legal Report Ex.PC, injury sheet Ex.PC/1, recovery memo of empties Ex.PD, National Forensic Report Ex.PK, Punjab Forensic Report Ex.PQ,

Memo of Identification of body Ex.PG, Scale Site Plan Ex.PA and recovery of pistol Ex.PJ.

7. It is pertinent to observe that in response to the charge sheet, appellant pleaded guilty on 11.03.2015, however, since the offence, in question, is the one entailing capital punishment, hence in light of law laid down by the superior courts and pursuant to sections 265E read with section 265F of Code of Criminal Procedure, 1898, learned trial court proceeded with the trial of the appellant.

8. Learned counsel for the appellant *inter alia* contended that appellant merits acquittal inasmuch as there is no case to answer. In this behalf, it was contended that incident is of 21.08.2014 at 5:30 but FIR was lodged at 8:45 p.m. without any justification or reasons. It was further contended that recovery of pistol was effected, however, the same was sent for forensic, with the bullets, at the same time in violation of the observations made by the august Apex Court. It was also submitted that delay, in sending the bullets and pistol for forensic, is without any justification or basis. It was further submitted that application for post-mortem (Ex.PB/1) is dated 22.08.2014 and finds mentioned of MLC 2239, which is neither here nor there. It was also contended that post-mortem report is dated 02.10.2014 again without justification or basis. Learned counsel pointed out that inquest report indicates that eyes of the deceased were partially opened; it means that complainant has not witnessed the occurrence inasmuch as it is trite law that relatives of the

deceased always close the eyes. Reliance was placed on case reported as 'Muhammad Rafique alias Feeqa Vs. State' (2019 SCMR 1068). It was contended that complainant did not witness the offence inasmuch as per FIR, he heard the noise and sounds of shots, when he came to the place of occurrence, which means that he has not witnessed the initial shots. It was further submitted that recovery of the pistol was effected on 27.08.2014 on pointation of appellant, whereas the same was sent for forensic much later.

9. Learned State Counsel along with learned counsel for the complainant *inter alia* contended that prosecution has proved its case beyond reasonable doubt inasmuch as there is ocular account which is duly supported by the medical opinion. It was contended that there is no discrepancy in the medical and ocular accounts; that the recovery was effected on the pointation of appellant and forensic report is positive. It was contended that even-otherwise, the appellant pleaded guilty to the charge hence, he ought to have been convicted and punished accordingly.

10. Arguments advanced by learned counsel for the parties have been heard and the documents, placed on record, examined with their able assistance.

11. As noted above, the appellant pleaded guilty to the charge sheet and the same is borne out from examination of record. No direct question was put to the appellant in this behalf while recording his statement under section 342 Cr.P.C., however, he

denied guilt and pleaded innocence; he also entered the witness box in order to substantiate his innocence but during cross-examination, he conceded that he pleaded guilty to the charges and was aware of the same. However, under section 265E of Code of Criminal Procedure, 1898, the charge sheet is to be read out and explained to the accused and he/she is asked to plead whether guilty or has any defence to make under subsection (2) of the referred provision. If the accused pleads guilty, the court shall record the plea and may, in its discretion, convict him of the offence but it may also proceed despite plea of guilty under section 265-F Cr.P.C. In this behalf, in case reported as 'Muhammad Ismail Vs. The State' (2017 SCMR 713), the august Apex Court observed that under section 265F Cr.P.C., if trial court does not convict the accused on the plea of guilt, it shall proceed to hear the complainant and take all evidence as may be produced in support of the prosecution. It was observed that such discretion was to be exercised with due care and caution and ordinarily on such admission, awarding capital sentence of death, should be avoided and to prove the guilt of an accused, evidence of the complainant or the prosecution had to be recorded, in the interest of safe administration of justice. This view was relied upon by this Court in case reported as 'The State Vs. Zafar Ali' (2019 YLR 2006). In case reported as 'Azhar Iqbal Vs. The State' (2013 SCMR 383), it was observed that law is settled that if prosecution fails to prove its case against an accused person, then accused person is to be acquitted, even if,

he had taken a plea and had admitted killing the deceased, hence in view of above case law, the fact that accused had pleaded guilty to the charge, is inconsequential inasmuch as learned trial court decided to proceed with the trial, despite a plea of guilt, as pursuant to the safe administration of justice, it was a plausible thing to do considering the fact that the offence attracts capital punishment.

12. The ocular account of incident has been stated by complainant Shakir Hussain (PW-6), Mst. Rukhsana Bibi (PW-7) and Pervaiz Akhtar (PW-8). In this behalf, Mst. Rukhsana Bibi has seen the entire episode and has stated so in her examination-in-chief while Shakir Hussain (PW-6) came to the scene of crime upon hearing hue and cry and also sound of shots fired; he acknowledges in his statement as well as cross-examination that by the time he arrived at the scene of crime, one or two shots had been fired however he reached the place of occurrence in no time, as there was no boundary wall and the house was adjacent. Last person, to arrive at the scene of occurrence, was Pervaiz Akhtar (PW-8), who also supported the ocular account of Shakir Hussain and Mst. Rukhsana Bibi. Though it has been stated by witnesses that people from neighborhood had gathered yet none gave evidence which is understandable, as people avoid getting entangled in such like matters.

13. The empties recovered from the scene of crime, were seven and as per post-mortem report and testimony of Dr. Tanveer Afsar Malik (PW-5), deceased received six bullet shots injuries,

out of which, five injuries were entry-exit and one grazed the deceased, whereas Mst. Rukhsana Bibi injured, received one shot which made entry and exit. In this behalf, medical opinion supports the post-mortem report and the ocular account.

14. The recovery was made from the bushes at the place near Kalma Chowk Simli Dam, which is somewhat an open place, on the pointation of appellant on 27.08.2014 in presence of Muhammad Imran ASI (PW-9) and Muhammad Riaz SI (PW-12), which is duly evidenced by the said persons in Ex.PJ (Memo of Recovery). The recovery has been effected after six days of the incident from almost a public place, hence is of little or no significance. Reliance is placed on cases reported as 'Muhammad Saleem Vs. Shabbir Ahmed (2016 SCMR 1605), 'Arshad Khan Vs. The State (2017 SCMR 564) and 'Sajjan Solangi Vs. The State' (2019 SCMR 872). Even-otherwise, samples of the crime empties and the pistol were sent on 29.01.2015 for forensic i.e. almost five months after the recovery and that too together, hence report being positive, has no significance whatsoever. Reliance is placed on cases reported as 'Muhammad Ashraf Vs. The State (2019 SCMR 652), 'Umer Khursheed Vs. Syed Tufail' (2018 SCMR 1051) and 'Nasrullah Vs. The State' (2017 SCMR 724).

15. The prosecution had set a motive with respect to the share in the property, but no cogent evidence was led to substantiate the same.

16. Undoubtedly, there is over-writing on the post-mortem report of 22.08.2014, which fact has also been stated by PW-5.

The fact that it is stamped and bears date 02.10.2014; it seems that post-mortem report as well as Shalwar Qameez, were received by the police on 02.10.2014.

17. The crux of the matter, in light of the above facts, is that ocular account is somewhat consistent with minor discrepancies. Three witnesses, who witnessed the occurrence, have stood the test of cross-examination and have categorically deposed to the effect that appellant, by firing at the deceased, killed him and injured Mst. Rukhsana Bibi. The details of the witnesses about mode, time date and manner of occurrence, are the same; the fact that recovery is of no significance and the motive also does not stand proved, does not exonerate the appellant. It is trite law that where such is the case that ocular account is consistent but motive and recovery is not established, the same has no bearing on the conviction but the sentence is reduced. Reliance is placed on cases reported as 'Nawab Ali Vs. The State' (2019 SCMR 2009), 'Sarwar Vs. The State' (2020 SCMR 1250), 'Ghulam Murtaza Vs. The State' (2021 SCMR 149), 'Ghaffar Ali Vs. The State' (2021 SCMR 354) and 'Muhammad Afzal Vs. The State' (2021 SCMR 289).

18. For what has been stated above, instant appeal against conviction, is dismissed, however, in light of extenuating circumstances viz failure of the prosecution to prove motive and recovery being ineffective, the death sentence awarded to the appellant, is reduced to life imprisonment and the rest of the sentence remaining the same qua compensation and penalty.

The conviction and sentence with respect to offence under section 324 PPC shall remain the same.

19. The Murder Reference is answered in 'Negative'. Since Criminal Appeal No.203-2018 stands decided, the jail appeal has become infructuous and is disposed of accordingly.

(AAMER FAROOQ)
JUDGE

(CHIEF JUSTICE)

Announced in Open Court on 14.07.2021

JUDGE

(CHIEF JUSTICE)

Zawar