

2007 S C M R 108**[Supreme Court of Pakistan]****Present: Sardar Muhammad Raza Khan and Raja Fayyaz Ahmed, JJ****MUHAMMAD ISHAQUE----Appellant****Versus****THE STATE----Respondent**

Criminal Appeal No.115 of 2004 and Jail Petition No.246 of 2002, decided on 8th August, 2006.

(On appeal from the judgment, dated 10-6-2002 passed by the Lahore High Court Rawalpindi Bench, Rawalpindi in Criminal Appeal No.498 of 2000).

Penal Code (XLV of 1860)---

----Ss. 302 & 324---Reappraisal of evidence---Previous enmity---Conflict between ocular and medical evidence---Effect---Trial Court convicted accused/appellant under Ss.302 & 324, P.P.C. and sentenced him to life imprisonment---High Court on appeal upheld the finding of Trial Court---Validity---Prosecution failed to explain delay in lodging F.I.R.---Complainant allegedly witnessed the murder of his real brother but in spite of that he did not go to police station to promptly lodge F.I.R.---Enmity between accused and complainant including eye-witnesses having been proved, the ocular testimony of complainant side required strong support from unimpeachable source of evidence---Prosecution sought corroboration from motive but in presence of proved enmity between the parties, motive was to cut both ways and was to be equally a motive for false charge---Gun recovered from possession of accused was not to be taken as a corroborative evidence as the same was licensed one and, moreover, gun did not match with all the four empties allegedly recovered from place where accused fired at the deceased---Site plan showed that deceased was fired at from a distance of 132 feet but there was 'burning on all four inlet wounds of deceased---Burning on wounds was to occur when muzzle was at a distance of 5 to 6 feet from victim; and burning from a distance of 132 feet was not possible---Nature of injuries caused to deceased belied the prosecution version as to distance from which deceased was fired at---Neither any pellets were recovered from premises (mosque) nor any child receiving lesson from complainant was ever examined---Accused was acquitted in circumstances.?

Ch. Afrasiab Khan Advocate Supreme Court with M.A. Zaidi, Advocate-on-Record for Appellant (in both cases).

Mehmood A. Sheikh, Advocate Supreme Court for the State.

Date of hearing: 8th August, 2006.

JUDGMENT

SARDAR MUHAMMAD RAZA KHAN, J--- Leave has been granted to Muhammad Ishaque son of Ghulam Din against the judgment dated 10-6-2002 rendered by a learned Judge in Lahore High Court, Rawalpindi Bench, whereby his appeal against conviction and sentence was rejected. Initially, learned Additional District and Sessions Judge, Gujar Khan vide judgment, dated 31-10-2000 had convicted the appellant under section 302, P.P.C. and sentenced him to life imprisonment and to a payment of Rs.1,00,000 as compensation under section 544-A, Cr.P.C. He was also convicted under section 324, P.P.C. and sentenced to imprisonment for five years with a fine of Rs.10,000.

2. The background of the occurrence given by Zafar Iqbal complainant is that, on 19-4-1999 at about 6-15 a.m. he was giving lesson to children in the village mosque when Muhammad Ishaque appellant called him from the rooftop of one Talib Hussain asking the complainant to come out of the mosque. On second call the complainant replied that he would come out after completion of Daras. On third call he came out to the courtyard of the mosque with the same answer. The appellant descended from the rooftop, went to his house, returned while armed with a .12 bore shotgun and fired three shots at Zafar Iqbal, hitting the outer wall and the right side of the outer gate.

3. Hearing the report of fire shots Shaukat Ali, the brother of the complainant ascended the rooftop of the house of Ali Qadar and forbade Muhammad Ishaque from firing. Muhammad Ishaque turned towards Shaukat Ali and fired at him hitting him on his chest. The victim died on the spot. The occurrence, besides complainant, was said to have been witnessed by Manga Khan and Ali Qadar. The motive is, that about a year prior to the occurrence, Muhammad Ishaque had lodged a report under section 337-A, P.P.C. against the complainant as well as Shaukat Ali, the deceased. A day prior to the occurrence i.e. on 18-4-1999 Shaukat Ali deceased and Muhammad Ishaque accused had quarrelled with each other on a dispute over a path. The complainant had intervened to settle the matter.

4. On conclusion of trial, the prosecution relied upon the ocular testimony of Zafar Iqbal P.W.4, Ali Qadar P.W.5 and Manga Khan P.W.6. Further support is sought from the post-mortem report, recovery of .12 bore shotgun at the instance of the accused, on 24-5-1999. It may be recalled that the occurrence having taken place on 19-4-1999, the accused was arrested on 17-5-1999 while the discovery of gun occurred on 24-5-1999. Admittedly, it was a licensed shotgun.

5. It is a fact proved on record that not only the complainant but also the two eye-witnesses have direct enmity with the accused and a case already stood registered against them under section 337-A, P.P.C. at the instance of the wife of Muhammad Ishaque appellant. In this background of proved enmity, the ocular testimony of all the three witnesses would require strong support from unimpeachable source. Whether such corroboration is available or not, is the important exercise to be adhered to.

6. Beginning from Zafar Iqbal, one may recall that he was allegedly fired at three shots from .12 bore shotgun by the appellant, from a distance of 160 feet. In spite of a wide dispersal in view of the distance involved, the complainant escaped totally unhurt. This cannot be overlooked on the argument of being a coincidence because in almost the same distance, the assailant killed Shaukat Ali with just one fire shot. We inculcate doubt qua the presence of complainant in the mosque. No pellets were recovered from the mosque and no child receiving lesson from the complainant was ever examined.

7. Despite the murder of his real brother, allegedly witnessed by him, the complainant did not go to the police station. Someone by the name of Ch. Muhammad Azeem Member District Council had informed the police. Had the complainant been present on the spot he would certainly have gone to lodge the report.

8. There is also an unexplained delay extending to about five and a half hours in lodging the report. Apparently, it seems to have been delayed by two hours fifteen minutes but the evidence negates it altogether. The Investigating Officer Noor Muhammad, S.-I. (P.W.8), during cross-examination and in his spontaneous first breath, admitted that telephonic information was received by him at 5-00 a.m. Meaning thereby that the occurrence must have taken place prior to 5-00 a.m. as against the time given by the complainant as 6-15 a.m. Realizing that his receipt of telephonic information at 5-00 a.m. contradicts the entries in the F.I.R. the Investigating Officer corrected himself saying that the information was received at 7-30 a.m. and he reached the spot in one hour i.e. at 8-30 a.m. All the witnesses have unanimously stated that the Investigating Officer reached the spot at 10-00/10-30 a.m. We are of the considered view that the occurrence had taken place prior to 5-00 a.m. not witnessed by anyone and so the deliberations were made in recording the F.I.R. after 10-30 a.m. but incorrect time was mentioned in the F.I.R. as 8-30 a.m. in order to conceal the possibility of deliberations.

9. When cross-examined, the complainant said that he had joined the Fajar prayer at about 4-30 a.m. but did not remember the name of Pesh Imam. Anyhow, he is not the Pesh Imam. Realizing the probable contradictions, he suddenly took a somersault and said that he had offered the prayer at 5-00/5-30 a.m. individually. Such contradictions indicate that he was not at all present at the mosque. His false presence was concocted to bring the time of occurrence to 6-15 a.m. which seems to be prior to 5-00 a.m.

10. The complainant and other witnesses admitted that the roof of the house of one Muhammad Sarwar was at a higher level than that of Talib Hussain where the assailant was standing. According to site plan the roof of Muhammad Sarwar intervenes the places of the accused and the victim. One cannot make out from the site plan as to whether the roof of Ali Qadar where the victim died was clearly seen from the courtyard of the mosque. The presence of the witnesses as well as the alleged time of occurrence is highly doubtful.

11. Corroboration is sought from the motive but, as the aforesaid background would suggest, it can cut both ways and can equally be a motive for false charge.

12. Further corroboration is sought from the discovery of .12 bore shotgun. Strictly speaking, it is not discovery at all, at the first place because the gun of the accused is licensed one, which licence was recovered along therewith. Moreover, it did not match with all the four empties allegedly recovered from the rooftop of Talib Hussain, a place attributed to the accused.

13. Last but not the least, corroboration is sought from the post-mortem report but strange it is to observe that it was totally ignored by the two Courts that post-mortem report has further damaged the already doubtful case of the prosecution. We are surprised to notice that there is burning on all the four inlet wounds of the deceased. Such burning can occur at the most from a distance of 5 to 6 feet from muzzle to the victim. Amazingly, the distance from the assailant to the victim is 132 feet.

14. One cannot say that the doctor has written burning on the inlet wounds incorrectly and that the injuries could not have been caused from short distance. Before adverting to this

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