P L D 1993 Peshawar 138

Before Muhammad Bashir Khan Jehangiri and Jalal-ud-Din Akbar Jee, JJ

MUHAMMAD FIAZ---Appellant

versus

THE STATE---Respondent

Criminal Appeal No.29 of 1991. decided on 27th February, 1993.

(a) Criminal Procedure Code (V of 1898)---

----S. 510---Penal Code (XLV of 1860), S.304, Part I---Fire-arms Expert's report---Evidentiary value---Where the pistol and the empty had remained in police custody for sufficiently long time the report of the Fire-arms Expert would not be of much evidentiary value and could not be relied upon as the possibility of the substitution of the empty could not be ruled out.

(b) Penal Code (XLV of 1860)---

----S. 304, Part I---Appreciation of evidence---Both sides had suppressed actual facts---Accused appeared to have suffered the injuries in the cause of occurrence and prosecution had omitted to explain the same---Right of self-defence accruing to accused was spelt out from the evidence on record and he had not exceeded such right---Accused was acquitted in circumstances.

Sardar Ali v. Crown PLD 1953 FC 93; Muhammad v. Ghaus 1972 SCMR 264; Ahmad Din v. Faiz Ahmed 1972 SCMR 54; Muhammad Abdullah v. Muhammad Safdar Khan 1973 SCMR 26 and Miran Bux v. Niaz 1975 SCM R 337 rei.

(c) Penal Code (XLV of 1860)--

----S. 304, Part I---Qanun-e-Shahadat (10 of 1984), Art.121---Self-defence--Even if the accused fails to adequately establish his plea of self-defense, he is nevertheless entitled to the benefit of such doubt if the gaps appearing in the prosecution case raise the possibility of the existence of a case of self-defence.

Sardar Ali v. Crown PLD 1953 FC 93; Muhammad v. Ghaus 1972 SCMR 264; Ahmad Din v. Faiz Ahmed 1972 SCMR 54; Muhammad Abdullah v. Muhammad Safdar Khan 1973 SCMR 26 and Miran Bux v. Niaz 1975 SCMR 337 rel.

(d) West Pakistan Arms Ordinance (XX of 1963)---

----S. 13---Trial by Sessions Court---Offence now being exclusively triable by a Magistrate of 1st Class, trial, conviction and sentence of accused by Sessions Court was not warranted under the law.

Abdullah Jan Mirza assisted by Malik Inayatullah for Appellant.

Muhammad Ayub Khan for the State.

Khalid Rehman Qureshi for the Complainant.

Date of hearing: 6th February, 1993.

JUDGMENT

MUHAMMAD BASHIR KHAN JEHANGIRI, J.---Muhammad Fiaz (25/26) son of Waris Khan, resident of Mohallah Bandi in village Kot Najibullah Tehsil Haripur then District Abottabad, was tried by the learned Additional sessions Judge-I, Haripur, for the murder of his co-villager Rafaqat alias Farakat, aged 24 years, committed by him on the evening of 13th June, 1989. The learned trial Judge vide his judgment dated 8th August, 1991 convicted him under section 304, Part I, PPC and sentenced him to rigorous imprisonment for seven tears and fine of Rs. 15000 or in default to rigorous imprisonment for one tear for the former offence and to rigorous imprisonment for one year and a fine of Rs.500 for latter. The fine for the former offence on realization was directed to be paid as compensation to the heirs of the deceased. The benefit if section 382-B, Cr.P.C. was also extended to him.

2. Muhammad Fiaz, convict has filed this has filed this appeal against his convictions and sentences as aforesaid.

3. Mst. Temrezan complainant who is mother of Rafaqat deceased has filed Criminal Revision No. 29/91 for conviction of the appellant under section 302, P.P.C. and consequential enhancement of sentence and awarding of appropriate compensation under section 544-A Cr .P.C. besides the fine.

4.Since the Appeal and the Criminal Revision have arisen out of one and the same Judgment both are being disposed of by this single judgment.

5. The facts of the prosecution case as stated in the report Exh P.A/1 lodged in the Civil Hospital Kot Najibullah and later reiterated by Mst. Tamrezan (P.W.6) at the trial are that on the evening of the fateful day she along with her deceased son Rafaqat were present in their house. In the mean time. Sher Zaman (P.W.7) their relative reached their house and revealed that a quarrel had ensued between him and Fiaz appellant who was armed with a pistol and then the said Sher Zaman went back followed by Rafaqat deceased According to the first informant she forbade her son from going to the spot but he did not heed to her beseeching. Nonetheless she followed her son to the road side near the village high school. Which she reached the spot she witnessed the appellant firing at her son which hit him on his thigh. The deceased fell unconscious on the ground after the appellant decamped from the spot. Herr evidence further is that her son was rushed to the Rural Health Centre. Kot Najibullah with the help of Sher Zaman P.W.. but the succumbed to the injuries.

6. The motive for the offence was stated to be can earlier attempt by the appellant at the life of the deceased on account of which the appellant was facing trial for an offence under section 307P.P.C.

7. After recording the report Exh P.A/1 of Tamrezan (P.W.6) at 9 p.m. the same night, on the basis of which F.I.R. Exh. P.A. was drawn up in the police Station Muhammad Naeem Khan S.H.O (P.W.9) prepared the injury sheet Exh.P.W.9/1 and Inquest Report Exh.P.W.9/2 of the deceased and sent the dead body to the mortuary for post-mortem examination. He then repaired to the spot and prepared the Site Plan Exh.P.B. In the course of spot inspection he secured blood stained earth vide recovery memo Exh.P.C. and sealed it into a parcel. Similarly, the blood-stained shalwar P-2 of Tahir Mahmood who was also said to have received bullet injuries, which had been received from the Rural Health Centre and was also sealed into parcel vide memo. Exh.P.C./1.' Muhammad Naeem S.H.O. further claims to have picked up, at the instance of the appellant, vide pointation memo. Exh.P.W.5/1, an empty P-1 of .30 bore and sealed into still another parcel. It is further said that vide another pointation memo. Exh.P.W.9/4, the S.H.O. took into possession two empties P-4 and a missed cartridge P-5 again at the pointation of the appellant and sealed them into parcel. Thereafter the S.H.O. arrested the accused. He sent the blood stained earth and clothes to the Chemical Analyst whose report is Exh.P.W.9/6 while report of the Arms Expert is EXh.P. W .9/7.

8. The post-mortem conducted by Dr. Iftikhar Ahmad (P.W.4) on the dead body of Rafaqat deceased revealed the following injuries:--

(1) Fire arm entrance wound of size 1/2" x 1/2" in front of left thigh upper 1/3" x 2" below ingoinal ligament.

(2) Fire-arm exist wound of size 3/4" x 3/4" on left buttock 1-1/2" above and lateral to anus and is continuous with injury No. 1.

On internal examination; all the internal organs were found healthy. The stomach contained small amount of liquid food. Upper left thigh muscles were injured. The death, according to the doctor, had occurred on account of haemorrhage due to direct injury to the left thigh muscle by lire-arm leading to shock. The probable time that elapsed between injury and death was about an hour while that between death and post-mortem examination was 9-1/2 hours.

9. The same doctor on the 13th June, 1989 at 9.30 a.m. had examined one Tariq Mahmood son of Mir. Akbar aged about 26/27 years and found the following injuries on his person:--

(1) Fire-arm entrance wound of size 1/2" x 1/2" on back of left shoulder with corresponding cut on shirt.

(2) Fire-arm exit wound of size 1/2" x 1/2" on back of left shoulder with corresponding cut on shirt, continuous to injury No. 1 and .2" apart lateral to injury No.1.

10. On the complicity of the appellant the prosecution examined 9 witnesses in all including Msl. Tamrezan (P.W. 6) and Sher Zaman alias Shera (P.W.7) who furnished eye-account of the occurrence. .

11. The appellant in his statement under section 342, Cr.P.C. has denied all the prosecution allegations. In this behalf it has been stated by the appellant that Mst. Tamrezan (P.W.6) and Sher Zaman (P.W.7) being the close relatives of the deceased had falsely deposed against him. When asked as, to what was his statement and why he has been charged that is what the appellant had stated:--

"I am innocent and have falsely been charged in this case. The deceased and Sher Zaman alias Shera arrived at the spot and gave me beating. Shera P.W. started firing with the result that the deceased was hit with the fire-shot of a pistol and one another person .namely Tariq was also injured at the hand of Shera. The father of deceased later produced that pistol, with which Shera had fired, to the I.O. who planted the same against me. I was medically examined for my injuries through the police. Due to previous enmity I have been held up falsely in this case. The deceased was a man of bad character and he was involved in many criminal cases pertaining to P.S. Kot Najibullah and had many enemies. The 1.0. recovered the empty cartridge of .30 bore from near the place where the deceased and Shera were present and had fired shot." .

12. In support of the allegations that-he had been beaten by the deceased and Shera P.W. the appellant was examined on 15-6-1989 at 9-30 a.m. by Dr. Nizakat, M.O. Rural Health Centre, Kot Najibullah, who recorded the following injuries on the person of the appellant:--

(1) Abrasion on the top of scalp 1/4" x 1/10" x skin deep.

(2) Abrasion. on lateral side of right index finger 1/4" x 1/8" x skin deep.

(3) Abrasion on the dorsum of left index mind finger 1/4" x 1/10" x skin deep.

(4) Bruise on left side of neck in the area of 2" redish

The injuries were declared to be simple in nature. The probable duration of these injuries was 24 to 48 hours.

13. The injury sheet Exh.P.W. 9/D-1 of the appellant had been prepared by the I.O. who stated that the appellant was bearing an injury on his head with clotted blood around it and on the two fingers of the two hands.

14. Dr. Nizakat, Medical Officer, has not been examined to substantiate the aforesaid injuries.

15. The two witnesses, namely, Mst. Tamrezan (P.W.6) and Sher Zaman alias Shera (P.W.7) when examined in the Court. fully supported the prosecution case and stated that on the eventful evening they had seen the appellant firing pistol shots at the spot as a result of which the deceased fell down and died in the Rural Health Centre, where he had been rushed after the

occurrence. The learned trial Court has believed the evidence of these two eye witnesses in particular and that of the others in general.

16. Mr. Abdullah Jan Mirza, 'Advocate, assisted by Malik Inayatullah Khan, Advocate, for the appellant had assailed the reasoning adopted by the. learned trial Judge to believe the ocular testimony of Mst. Temrezan (P.W.6) and Sher Zaman alias Shera (P.W.7) and submitted that the claim of at least the former was highly improbable not only from the bare reading of the FIR but also from her testimony in the Court. In this context it was submitted that both the star witnesses of the prosecution have suppressed the injuries which the appellant has received during the occurrence and they have thus left gaps which cast doubt as to whether they had actually seen the occurrence. It was also argued that Mst. Tamrezan was discreetly silent qua the injuries sustained by one Tariq Mahmood nor had she mentioned his name in the FIR. Again it is submitted that Sher Zaman P.W. has spoken of only one fire-shot and if it was so then the second shot had not been fired by the appellant which meant that Taiiq Mahmood had been injured by some one else and there is thus complete black out with regard to the identity of that person. It was urged with vehemence on behalf of appellant that both P.Ws. had conceded that the accused had fired shots in a lane in front of the house of Khan Afsar, the maternal-uncle of the appellant which not only negates the site plan but also the evidence of the two P.Ws. that the appellant had fired at the deceased on the road side near the village High School and this gives complete lie to their claim to have witnessed the occurrence. Reference was made to the distance of 15/20 paces from the house of Khan Afsar to the Pakka Road and it was maintained that if some one fired from that lane then points 1 and 3 in the site plan where the deceased and Shera were present could not be possibly seen which completely demolished the case of the prosecution. The learned counsel for the appellant then urged that none of the witnesses had stated that shots had been fired at point No. 2 in the site plan Exh.P.B. in front of the shop of Makhan as alleged by the Investigating Officer and that, in any case, conceding for a while that the shots were fired from point No.2 still this claim would be rendered doubtful for non recovery of any empty from that place. It was also objected on behalf of -the appellant that witnesses were silent on the point of recovery of empty from point No.9 for which no explanation was forthcoming either from the eye-witnesses or from other sources: As to the recovery of empties from point No. 8 and consequential report Exh. P.W.9/7 of the Firearms Expert it was.submitted that it was of no evidentiary value against the appellant.

17. As against this, -Mr. Mohammad Ayub Khan, the learned counsel appearing on behalf of the State assisted by Mr. Khalid Rehman Qureshi, Advocate, for the complainant contended that the injuries sustained by the appellant were minor in nature and were either self-inflicted or wore received while he was being deprived of the pistol. In so far as the injuries to Tariq Mahmood were concerned, it was urged that it was for him to have, come forward and if he had not done so, no adverse inference could be drawn qua. the prosecution. According to them, the presence of the two eye-witnesses is established even from their cross-examination particularly when no question was put to these witnesses as to how the accused had been injured. The injuries were defended on the ground that the duration given by the Medial Officer did not tally with the time of occurrence.

18. After hearing the learned counsel for the parties at length, I have formed the opinion that the claim of Mst. Tamrezan to have been present at the time and place of occurrence has not been

satisfactorily established on the record. I tend to agree with the learned counsel for the appellant that the narration in the report Exh. P.A. qua the manner in which Mst. Tamrezan was attracted to the spot is not only improbable but is also not confidence inspiring. The assertion that while Mst. Tamrezan (P.W.6) and Rafaqat deceased were present in their house and Sher rushed to the house to inform that Fiaz who was armed with a pistol had a quarrel with him and made good his escape out of scare and that thereafter he went back could not be easily swallowed. If he had run away out of scare then why he had come to inform the deceased and what was the justification for him to have gone back to' the spot. This assertion on behalf of the prosecution appears to be highly dubious. If it be so and there is no reason as to why it should not be believed then this fact was introduced in the report with a view to justify an old woman to have gone after her son.

19. No doubt the presence of `Shera at the venue of the crime has been admitted by the appellant in his statement recorded under section 342, Cr.P.C. That statement, if it is to be relied upon, has to be accepted as a whole and in that case the appellant who bears some stamps of injuries on his person would be entitled to the benefit of doubt even if he had failed to adequately establish his plea of self-defence particularly if the same raised a possibility of existence of such a case.

20. Mere presence of Sher Zaman (P.W.7) at the spot would not be sufficient to render him a credit worthy witness. He appears to have tried a suppress many material facts which had a direct beating on the culpability or otherwise of the appellant. For instance, not only Mst. Tamrezan but even Sher Zaman P.W. was discreetly silent as to the injuries which the appellant and Tariq Mahmood had sustained during the occurrence. Mst. Tamrezan had even not referred to the injuries caused to Tariq Mahmood in her examination-in-chief. Again both the P.Ws. had admitted in terms unequivocal that the firing had been made from the door on the western side of the house of Khan Afsar, maternal uncle of the appellant. This spot has been depicted in the site plan by the Investigating Officer. The distance between the said gate and the road is 15 to 20 paces. Looking to the entries in the site plan this place was not visible from points 3 and 4 where Mst. Tamrezan and Sher Zaman P.Ws. were said to have been present at the, time of the occurrence and then it has belied the claim of the prosecution that the deceased had been fired-at point No.1 from point No. 2. Conceding for a while that the shot had been tired from point No.2 still this fact is rendered highly doubtful for non-recovery of any empty from this place. This conclusion is reinforced from the recovery of two empties of .30 bore and one missed cartridge of the same bore from the top of the roof of shop of Makhan at the pointation of the accused. Both the eyewitnesses are silent as to the recovery of an, empty from point No. 9 where the deceased is said to have fallen after being hit at point No. 1. This recovery has not been explained by the prosecution and would give support to the allegation of firing by the prosecution side as well. Again the empty recovered from point. 9 was not sent to the Arms Expert to rind out from which weapon it has been fired. Besides, the recovery of the pistol P-1 of .30 bore which is alleged to have been produced to the 1.0. by the appellant on 14-6-1989 vide recovery memo Exh.P.5/1 does not inspire confidence. There is no reason as to why the appellant would produce the pistol P-1 to the Investigation Officer at the time of his arrest. This assertion of the 1.0. is highly improbable and cannot be accepted as truthful. Its contents are further negated by the narration in the application Ex. P.M. 9/D-1 of the I.O. addressed to the Medical Officer, Civil Hospital, Kot Najibullah. It lends further support to the assertion of the appellant that the pistol P-1 was produced by Muhammad Aslam father of the deceased which has been.

illegally foisted on him. 1n consequence the report Exh.P.W.9/7 of the Arms Expert is of no consequence qua the appellant.

21. I find no difficulty in agreeing with the learned counsel for the appellant that the report Ex.P.W.9/7 of the Arms Expert would not be of much evidentiary value for the reasons that the pistol and the empty had remained in p, the custody of the police for sufficiently long time. No reliance can be placed on the said report as the possibility of the substitution of the empty cannot be ruled out.

22. It is a settled principle of law that even if the appellant had failed to adequately establish his plea of self-defence, he was nevertheless, entitled to the benefit of such doubt and gaps as appeared in the prosecution case particularly the same raised the possibility of the existence of a case of selfdefence. Reliance in this context was placed on the precedent cases of: Safdar Ali v. Crown (PLD 1953 FC 93), Muhammad v. Ghaus (1972 SCMR 264), Ahmad Din v. Faiz Ahmed (1972 SCMR 54), Muhammad Abdullah v. Muhammad Safdar Khan (1973 SCMR 26) and Miran Bux v. Niaz (1975 SCMR 337).

23. The prosecution version that the said injuries could be self-inflicted or had been caused in the course of the arrest of, the appellant do not appeal to reason. It is thus apparent from the record that both sides had suppressed actual facts, for, there is every indication that the appellant had suffered the injuries in the course of occurrence but the prosecution had conveniently omitted to explain the same. The appellant had also like-wise failed to account for the fire-arm injuries on the person of the deceased but the defence even if it fails to fully establish from its own evidence its plea of self-defence as is required by Article 121 of the Oanun-e-Shahadat corresponding to section 105 of the Evidence Act, can claim benefit of omissions and doubts appearing in the prosecution evidence as can reasonably raise a presumption as to the existence of a right of private defence. In Safdar Ali's case cited above it had been observed:--

"If after examination of the whole evidence the Court is of the opinion that there is a reasonable possibility that the defence put forward by the accused might be true, it is clear that such a view reacts on the whole prosecution case. In these circumstances the accused is entitled to the benefit of doubt, not as a matter of grace, but as of right, because the prosecution has not proved its case beyond reasonable doubt."

24. In these circumstances, the prosecution evidence is not convincing as the true facts of the occurrence or the part attributed to each involved in it. If the appellant had been attacked by the deceased and Shera P.W. as is alleged by the appellant he had a right of self-defence and there is nothing to show, as already discussed, that he had inflicted any injury except at the spot and as such he could not be held to be guilty of having exceeded his such right. In these circumstances, I consider him entitled to the benefit of doubt.

25. It maybe pointed out at this juncture that the offence under section 13 of the Arms Ordinance, 1965 is now triable exclusively by a Magistrate of the Ist Class and the trial/conviction and sentence of the appellant on that score is not warranted under the law as it is in force.

26. Accordingly, I accept his appeal, set aside his convictions and sentences and acquit him. He shall be set at liberty forthwith if not wanted in any other case.

27. In view of what has been held above, there is no substance in Criminal Revision No. 29/91 which is also dismissed.

N.H.Q./1461/P Appeal accepted.