IN TH SUPREME APPELLATE COURT GILGIT- BALTISTAN

Cr. Appeal No. 13/2010

Before: Mr.Justice Muhammad Nawaz Abbasi, Chief Judge
Mr. Justice Syed Jaffar Shah, Judge

Ghulam Muhammad s/o Haji Rehmat Ali r/o Haji Gam at present District jail Skardu. Petitioner/Appellant

Versus

The State Respondent

CHARGE UNDER SECTION 302 PPC VIDE FIR NO. 35/09 AND SECTION 13 ARMS ORDINANCE VIDE FIR NO.37/09 POLICE STATION SKARDU.

PETITION FOR LEAVE TO APPEAL AGAINST THE JUDGMENT/ORDER DATED 02.11.2010 OF LEARNED CHIEF COURT, WHEREBY THE LEARNED CHIEF COURT ENHANCED THE SENTENCE FROM LIFE IMPRISONMENT TO DEATH SENTENCE U/S 302(B) PPC AND FINE RS. 500000/-(SAY: RUPEES FIVE HUNDRED THEOUSANDS) AS COMPENSATION TO THE LEGAL HEIRS UNDER SECTION 544-A CR. P.C.

Present: Ch. Abdul Aziz Advocate Supreme Court of Pakistan for the petitioner.
Advocate General for the State.
Malik Haq Nawaz Sr. Advocate for Complainant.

Date of Hearing:-12.05.2011

JUDGMENT

Justice Muhammad Nawaz Abbasi CJ: This Cr. Appeal has been directed against the judgment dated 02.11.2010 passed by Chief Court, whereby the Cr. Appeal filed by the appellant against the conviction and sentence of life imprisonment awarded to him under Section 302 PPC by a learned Additional Sessions judge

Skardu has been dismissed and a Cr. Revision filed by State for enhancement of sentence of appellant has been allowed.

2. The appellant was tried for the Charge of Murder under Section 302 PPC and having been found guilty by the trial Judge was convicted and awarded the sentence of life imprisonment with fine of Rs. 500000/- (five lac) vide Judgment dated 31.03.2010 with direction that fine if recovered would be paid to the legal heirs of the deceased as compensation under section 544-A Cr.Pc. The Chief Court dismissed the appeal of the appellant and by allowing Cr.Revision filed by the state, enhanced the sentence of appellant from life imprisonment to death under Section 302 (b) PPC.

3. The brief facts in the background as narrated in the FIR lodged at P.S City Skardu By Eng. Ghulam Abbas brother of deceased Ghulam Hussain are that on 16.07.2009 at about 5:45 pm Ghulam Muhammad accused taking the deceased with him in a vehicle went towards Sadpara lake and while proceeding towards Sadpara Lake in the vehicle were also seen by Haji Shakoor Ali.

4. The complainant at about 10:00 pm on receiving information that dead body of deceased was lying in Civil Hospital Skardu, went to the Civil Hospital and lodged the report at the Police Station. The motive behind the murder of deceased as disclosed in the FIR was the transaction of money between the accused and the deceased. It is stated that accused borrowed a sum of Rs 10 lac from the deceased and on demand of return of money by the deceased; the accused planned to remove him from the scene.

5. This is an unseen occurrence and prosecution relied upon circumstantial evidence of last seen, the recovery of weapon of offence with live bullets, and empties from inside the vehicle in which deceased was taken by the accused towards Sadpara lake. In proof of the charge, the prosecution has produced Dr. Muhammad Taqi, (PW-1) who conducted medical examination of dead body, Ghulam Abbas, (PW-2) real brother of the deceased had seen the accused and deceased together while proceeding towards Sadpara lake in a vehicle whereas Shakoor Ali had seen them at about 08:30 pm a.m. near Sadpara Lake. Fida Ali (PW-4) and Muhammad Hassan (PW-5) have seen the deceased in the company of accused at about 9:00 pm in a vehicle while coming from Sadpara Lake side thereafter, deceased dead body was found lying in Hospital. In addition to the above oral evidence the prosecution also examined the investigating officer and formal witnesses at the trial.

6. The death of deceased as per medical evidence happened at about 8:30 pm as a result of fire arm injury caused on left side of his chest.

The accused in his statement under section 342 Cr.Pc in answer to the question No. 6 has admitted the occurrence in the following manner:-

"It is correct that the occurrence was took place in My land cruiser. The full circumstances I will state in the last question"

7. In answer to last question the accused narrated the occurrence as under:-

"on the day of occurrence Ghulam Hussain deceased called me several times through his cell phone I went near to the deceased house and call on cell phone Ghulam Hussain came and told me to proceed towards Satpara Lake, I accordingly drive my Land Cruiser to the lake where PW Shakoor met us and asked for lift to Skardu but the deceased refused him and I and deceased came towards skardu. When we reached adjacent came towards skardu. When we reached adjacent to Mr. Shah Jahan's plot deceased asked to stop the vehicle to attend a natural call, I stopped the vehicle and the deceased descended from the vehicle and after a while came back, I am sure that the deceased has collected the pistol from the plot of Shah Jahan. when we reached near the house of Ghulam Murtaza and deceased Ghulam Hussain asked for returned the cheaque of Rs. 4,90,000/- and the stamp paper about land mortgage as I have already paid Rs. 4,65,000/- and I had to pay Rs.25,000/- for which I was ready but the deceased demanded a cheaque of Rs. 5,00,00,000/- (five hundred thousand). Suddenly the deceased shown a pistol and was about to fire on me I tried to snatched the pistol. In the mean time the pistol went off and hit the deceased. I rushed to DHQ Hospital along with the injured Ghulam Hussain and the Doctor in Hospital told me that this case is related to police, hence I along with my Land Cruiser Jeep and article therein went to Police Station Skardu and request them to accompany me to DHQ Hospital to arrange blood medicine etc for injured Ghulam Hussain the police turned a deaf-ear to my request and locked up me and about after two hours police told me that Ghulam Hussain expired and thereafter police took my vehicle /Land Cruiser out of the police station and shown fabricated/ planted recoveries and police tortured me and I am hospitalized twice.

8. The learned counsel for the appellant has contended firstly, that it was an unseen occurrence and the evidence brought by the prosecution has not directly or indirectly proved the charge against the appellant. Secondly, this is settled principle of Criminal law that the statement of an accused U/S 342 Cr. Pc. is to be accepted or rejected in toto and cannot be used in parts for the purpose of conviction or corroboration and thirdly, the single injury on the chest of deceased would strongly suggest that defence plea taken by the appellant in his statement under section 342 Cr. Pc was more plausible to be accepted.

Learned counsel next contended that the conduct of accused after the occurrence would also support his version as he could easily disappear by throwing the deceased out of vehicle but he took the deceased in injured condition to hospital in his vehicle to save his life and this act of accuse would squarely bring the transaction out of the ambit of Qatal-i –Amd. Therefore, conviction under Section 302 PPC was bad in law. The learned counsel next argued that mere last seen evidence and recovery of weapon with empties from the vehicle by itself would not be an evidence of Qatl-i-amd and except the statement of accused under Section 342 Cr. PC, there was no other evidence to connect the appellant with commission of an offence under Section 302 PPC. The learned counsel forcefully argued that inculpatory part of the statement of accused under Section 342 Cr.Pc would neither be used as confession nor as corroborative evidence to sustain the conviction and emphasized that statement of accused under section 342 Cr.pc must be accepted or rejected in toto whereas in the present case the trial Court as well as Chief Court having placed reliance on a portion of the statement of the accused to the extend of happening of incident held him guilty, and excluded the remaining part of statement containing the defence plea from consideration in departure to the settled principle of criminal administration of Justice.

9. The learned counsel lastly argued that neither the motive set up by the prosecution has been established nor the preplanning or intention to kill has been proved by any independent evidence, instead the appellant has been convicted on the basis of presumption of guilt and if the prosecution version is put in juxtaposition with the version of

defence, it would be hardly a case under Section 302 (c) PPC for the purpose of punishment.

10. The learned Advocate General assisted by Malik Haq Nawaz Sr. Advocate representing the complainant has vehemently argued that the prosecution story in verbatim has been disclosed by the appellant in his statement U/S 342 Cr.PC and the admission of accused being in line with the statement of witnesses would sufficient to prove the guilt of accused beyond any doubt and consequently, the appellant was under heavy burden to rebut the presumption of guilt by proving the defence plea that pistol used in the occurrence was in possession of deceased and during the course of resistance to the aggression of deceased Pistol went off as a result of which deceased sustained a single injury. The learned Advocate General argued that defence version is not plausible to be accepted and from scrutiny of prosecution evidence in the light of statement of accused wherein he admitted all the material facts, the guilt of the accused stood proved beyond any doubt. He added that the admission of accused regarding the transaction of money between the accused and deceased, the happening of sad incident in the vehicle of accused the scuffling of deceased with him and sustaining of fire arm injury by the deceased, the recovery of pistol from the vehicle of accused and taking the deceased by him in injured condition to the hospital would apparently negate the defence plea that deceased made an attempt at the life of appellant and as a result of the resistance of appellant, the deceased sustained the injury on chest.

The learned counsel for the complainant adopting the arguments of learned Advocate General added that in the circumstance in which the occurrence has taken place, no other inference except that it was a preplanned murder would be drawn and prosecution has been successful in proving charge against appellant beyond all reasonable doubts, therefore, in absence of any mitigating circumstance, the punishment of death awarded to the appellant by the Chief Court would not call for interference of this Court.

11. We have heard the learned counsels for the parties at length and have also gone through the record with their assistance. The first question required to be examined would relate to the value of the statement of an accused under Section 342 Cr.Pc. This is fundamental principle of Criminal administration of Justice that statement of an accused under Section 342 Cr.Pc containing admission/confession of guilt is to be accepted or rejected as a whole and Court is not supposed to excluded the exculpatory portion of statement from consideration and rely only on inculpatory portion of statement, rather, the Court has to consider the whole statement and decide the fate of case accordingly. The above rule of Criminal administration of Justice regarding acceptance or rejection of statement containing admission or confession of an accused U/S 342 Cr.PC is based on the principle that prosecution must stand on its own legs and conviction if is based solely on the statement of an accused U/S 342 Cr.PC, it is to be accepted as a whole. This principle is however subject to certain exceptions and may not have mandatory force in the normal circumstances in the case in which defence version is introduced in the statement U/S 342 Cr.PC. The confession for the purpose of conviction must be independent to the defence version. The admission of occurrence containing defence version neither can be treated as confession nor a sole evidence of guilt rather such admission may at the most is relevant for the purpose of corroboration and may not be used as an independent evidence of guilt.

Be that as it may, in the present case, the defence version introduced in the statement U/S 342 Cr.PC is not supported by any evidence oral or circumstantial on the record and also is not split out from prosecution evidence and consequently, no presumption of aggression of deceased could be raised on the basis of mere assertion in the defence version. The accused and deceased admittedly went together in a vehicle towards Sadpara lake and were also seen coming back together, but thereafter, the dead body of deceased was found lying in the hospital and in the given facts in absence of any direct evidence that in what manner the occurrence happened and how deceased sustained fire arm injury on his person coupled with the fact that he was lastly seen alive with accused, the presumption would be that accused was responsible for the unnatural death of deceased. This presumption is further supported by the fact that deceased without having any apprehension

in his mind of any mischief on the part of accused joined his company in casual dress and went with him in his vehicle towards Sadpara Dam. The medical evidence by itself would not suggest that the injury was caused to the deceased during the course of scuffling rather in the prevailing situation, the presumption would be that accused having pistol in his possession committed act of aggression. Therefore, in the peculiar circumstances of case the rule of acceptance or rejection of statement of accused under Section 342 Cr.PC as a whole may not be attracted but at the same time it may not be permissible in law to use a portion of statement of accused containing his admission of occurrence in confirmation of his guilt with exclusion of remaining portion containing the defence plea, rather the admission of the accused at the maximum could be used for the purpose of corroboration. There is sufficient case law on the subject of admissibility of inculpatory and exculpatory statement of an accused Under Section 342 Cr.PC qua his guilt, but there is no concept of acceptance of inculpatory portion of statement with exclusion of exculpatory statement in the same transaction. There being no plausibility in the defence version it is excluded from consideration.

12. The next question relates to the nature of offence committed by the appellant. The offence of Qatl-i- amd liable to Qisas is punishable with death under Section 302 (a) PPC, whereas the offence of Qatl-i-amd falling within the ambit of Section 302(b) PPC is punishable with death or imprisonment for life as Tazeer and all those cases of Qatl –i-amd which do not fall within the purview of section 302(a) and (b) PPC for the purpose of punishment, may fall under Section 302(c) PPC. Qisas as defined in Section 299(k) PPC means punishment by causing similar hurt at part of the body of the convict as offender has caused to the victim or in case of Qatl-i-amd by causing death of offender in the manner as he caused death of victim. Tazeer as defined under section 299(1) PPC means, the punishment other than Qisas, in which Diyat, Arsh or Daman is included. The proof of offence for punishment U\S 302 (a) PPC is either in the form provided in Section 304 PPC or confession of the accused before the Court which tried the accused whereas proof for punishment under section 302(b) PPC as Tazeer is either in from of confession of the accused or in terms of Article 17 of the Qaunn-e- Shahadat Order, 1984. The cases in which the proof of Qisas is not available and also are not punishable under section 302 (b)

PPC may fall within the ambit of Section 302 (c) PPC for the purpose of punishment. The cases in which the evidence is available in terms of Article 17 of the Qanun-e-Shahadat, Order, 1984, but the essential ingredients of Qatl-i-amd are missing may fall under Section 302 (c)PPC. The classification of cases of Qatl-e-Amd for purpose of punishment under section 302(a) and (b) PPC is either of Qisas or Tazeer, and cases which do not fall under Section 302 (a) and (b) PPC may fall Under Section 302(c) PPC, such as the cases of sudden provocation, without premeditation and self defence, etc.

In the present case, prosecution mainly relied upon the evidence of last seen, the recovery of pistol and weapon of offence, with Crime empties from inside the vehicle, the medical evidence and attending circumstances. The evidence of last seen been provided by Engineer Ghulam Muhammad, Skakoor Ali, Fida Ali and Ghulam Muhammad, these witnesses are quite natural and independent. Shakoor Ali is an employee of forest Department who desired to travel in the vehicle with accused but the deceased did not allow him to travel with them. The presence of Shakoor Ali in the forest area near the lake was quite natural and similarly the presence of Engineer Ghulam Muhammad real brother of deceased outside his house at the time when accused arriving in a vehicle took the deceased with him from his house was also quite natural. Fida Ali and Ghulam Muhammad have made statement in confirmation to the statement of Ghulam abbas and shakoor Ali. The deceased was seen in the company of accused by Engineer Ghulam Muhammad about two and half hours before the actual occurrence and they were again seen together by shakoor Ali while coming back from Lake side at about 9:00 pm in the same vehicle. The evidence of last seen with the evidence of recovery of pistol which was used as weapon of offence, and recovery of an empty with live bullets from the vehicle coupled with medical evidence and attending circumstance would be independently sufficient to prove he guilt of accused beyond any doubt and only question left for determination would be, whether it was a case of Qatl-i-Amd punishable under section 302(b) PPC or the occurrence was result of exceptional circumstance or it was a case of self defence as claimed by the appellant. The careful examination of the version of appellant given in his statement under section 342 Cr.PC in the light of prosecution evidence, would lead to the conclusion that the plea of accidental death as a result of resistance

of accused to the aggression of deceased would not appeal to mind rather, the circumstance leading to the occurrence as disclosed by the appellant would clearly suggest that something suddenly happened between the accused and deceased on the question of transaction of money and accused having pistol with him loosing temper in retaliation fired a single pistol short without intention to kill as a result of which deceased sutstained injury. The inference drawn by the trial Court and the Chief Court of intentional and preplanned murder may not be supported by any independent evidence on record, instead it appears form the circumstance of the case that something happened suddenly during the conversation on the issue of money and accused in consequence to the exchange of hot words in a rash and reckless manner suddenly fired a pistol shot at the deceased, but realizing the wrong done by him, immediately took the deceased to the hospital to save his life. The accused had ample opportunity to post the deceased out of the vehicle at a deserted placed in the dark, but he preferred to rush to hospital to save the life of deceased. The conduct of accused subsequent to the incident is a relevant fact, and in that, possession of unlicensed pistol by itself may not be an evidence of intention. Similarly the money transection between the deceased and accused may not be the immediate reason or motive of the sad incident.

13. In the light of above discussion and circumstances leading to the fateful occurrence, we are of the considered opinion that the occurrence was result of sudden flare up and it was not an intentional or a premeditated murder to bring it within the ambit of Section 302 (b) PPC, rather it would be a case Under Section 302 (c) PPC for the purpose of punishment, and we hold accordingly.

14. Having considered the circumstances under which the sad incident happened, this appeal is partly allowed in terms of short order which is made part of this Judgment as under:-

"For the reason to be recorded latter, this appeal is partly allowed. The sentence of death awarded to the appellant under section 302 (b) is converted into imprisonment of fifteen (15) years under section 302 (c) PPC, with direction that instead of compensation of Rs.500000/- an

amount equal to one Diyat, interms of notification for the financial year 2009, which comes about Rs. 110000/- (Eleven Lac) shall be paid to the legal heirs of the deceased. In default of payment of compensation, the appellant shall undergo S/I for six months and amount of compensation shall be recovered from him, as arrears of land revenues. The benefit of section 382 (b) Cr. Pc shall also be extended.''

15. **Appeal partly allowed**

Chief Judge

Judge