

**1998 P Cr. L J 1599**

**[Lahore]**

**Before Khalil-ur-Rehman Ramday and Mansoor Alamgir Qazi, JJ**

**MUTI ULLAH and others---Appellants**

**Versus**

**THE STATE---Respondent**

Criminal Appeal No. 1242 of 1988, heard on 28th July, 1997.

**(a) Penal Code (XLV of 1860)---**

---Ss. 302/34, 307/34 & 440/34---Appreciation of evidence---Pitched cross- firing had taken place between the parties on the day of occurrence and F.I.R. had been recorded after due deliberations and considerations---Crime-empties secured, from the spot were not found wedded with the rifle recovered from the accused, by the Forensic Science Laboratory---Injury sustained by the deceased for which the accused stood convicted could not be caused by the rifle of accused---Accused was acquitted in circumstances.

**(b) Penal Code (XLV or 1860)---**

---Ss. 302/34, 307/34 & 440/34---Motive---Motive being a double-edged weapon is an incentive for the accused to commit an offence as well as an opportunity for the complainant to implicate such persons.

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

---Ss. 302/34, 307/34 & 440/34---Appreciation of evidence---Injury suffered by accused appeared to be a self-inflicted injury and plea of self-defence taken by him wits not acceptable---Unlicensed gun recovered from accused was found wedded with the crime-empties secured from the place of incident---Deceased as well as the injured prosecution witness carried injuries caused by the gun of the accused---Convictions of accused under Ss.302 & 307, P.P.C. were consequently maintained but his sentence of death was altered to imprisonment for life---Conviction and sentence of accused under 5.440, P.P.C. were, however, set aside and he was acquitted of that charge.

Raja Muhammad Anwar assisted by Irfan Ahmad Saeed and Ahmad Hassan Khan for Appellants.

Syed Ali Raza for the State.

Sardar Khurram Latif Khosa for the Complainant.

Date of hearing: 28th July 1997.

## **JUDGMENT**

**MANSOOR ALAMGIR QAZI, J---** Matiullah 29 years and Khuda Yar 36 years appellants were arraigned for trial alongwith Muhammad Ajmal, Muhammad Akram, Muhammad Ashraf, Sher Dil sons of Ata Muhammad, Samiullah son of Ataullah, Muhammad Akram son of Khan Muhammad, Muhammad Asad son of Abdul Rehman and Zafar Khan son of Muhammad Abdullah before Ch. Ehsan-ul-Haq, Judge, Punjab Special Court for Speedy Trials No. 8, Sargodha (constituted under Act XV of 1987). Through judgment dated 11-12-1988, the learned trial Court convicted Matiullah and Khuda Yar appellants under section 302/34, P.P.C. and sentenced them to death each and a fine of Rs.30,000 each for the murder of Sanaullah deceased. In default of payment of said fine to further undergo R.I. for 5 years. Under section 307/34, P.P.C. for malting murderous assault on Aziz Khan (P.W.11) both the appellants were sentenced to 4 years. R.I. each and a fine of Rs.10,000 each in default of payment of fine to further undergo R.I. for one year each. They were also convicted under section 440/34, P.P.C. and sentenced to one year's R. I. each and a fine of Rs. 2,000 each and in default of payment of fine to further undergo R.I. for 2 months. It was further ordered that out of the fine, if recovered Rs. 40,000 shall be paid to the legal heirs of Sanaullah deceased, Rs. 5,000 shall be paid to Aziz Khan (P. W .11) and Rs.2,000 to Muhammad Feroze (P.W.10) as compensation under section 544-A, Cr.P.C. The remaining accused were acquitted of the charges by giving them the benefit of doubt. Sher Dil Accused was an absconder and was tried in absentia. He too was acquitted of the charges. Both the appellants were, however, acquitted for the murder of Haji Abdul Aziz Klan alongwith other co-accused. Muhammad Arif accused was found innocent and was recommended to be discharged by the Investigating Officer on 26-4-1987 and he was discharged by the Magistrate on the said recommendation.

2. Feeling aggrieved, the appellants have challenged their conviction and Sentences through Criminal Appeal No. 1242 of 1988 while the State feeling aggrieved over the, acquittal of the appellants for the murder of Haji Abdul Aziz and the acquittal of the remaining accused have preferred criminal appeal against Acquittal. No. 1243 of 1988. The complainant, has filed Criminal Revision No: 713 of 1988 praying for the enhancement of compensation and the fine awarded to the appellant and also prayed for convicting the acquitted respondents-accused. All these matters will be heard and decided through this judgment.

3. The present occurrence took place on 25-2-1987 at 2-30 p.m. in the area of Grain Market, Liaquat Abad situated at a distance of 1-1/2 furlong from Police Station Piplan, District Mianwali. Statement of Muhammad Feroze complainant (P.W.10) vide Exh.P.P. was recorded at the Police Station on the said day at 3-30 p.m. by Allah Yar (P.W.13).

4. The motive set in the F.I.R. Exh.P.P. is that three days prior to the occurrence Mutiullah appellant etc. had beaten Muhammad Iqbal Peracha an Arrhti and the complainants helping said Muhammad Iqbal had got registered a case under section 506/342/148/149, P.P.C. against 'Mutiullah appellant etc. It is further stated that about two years prior to this occurrence Aziz Khan etc. who are the first cousins of Sanaullah

deceased had caused injuries to Mutiullah appellant whereupon a case against Aziz Khan etc. was registered under section 307, P.P.C. and in that case the accused Aziz Khan etc. had been acquitted. It is in this background that the accused made a concerted attack in prosecution of the common object of the said unlawful assembly and committed the murder of Sanaullah and Haji Abdul Aziz and caused injuries to Aziz Khan (P.W.11).

5. Briefly the facts as narrated by the complainant are that he has a shop of Arrhat as well as a shop for selling arms ammunition. On 25-2-1987 at 2-30 p.m. he (P.W.10), Sanaullah deceased, Aziz Khan (P.W.11), Sher Bahadur (P.W.12), Falak Sher P.W. (not produced) and Abdul Rehman P.W. (not produced) were sitting in front of his shop in the Grain Market on cots placed on the terrace in front of his shop. All the accused alongwith one Arif and Slier Dil proclaimed offender armed with fire-arms came from the gate of the Grain Market. Sher Dil (P.O.) raised a Lalkara and fired at Sanaullah deceased hitting him on the front of his chest. Sanaullah deceased fell down. The complainant took shelter in his arms and ammunition shop while the rest of the P.Ws. took shelter in the Arrhat shop of the complainant. Both the shops adjoin each other. It is stated that all the accused started firing towards them and he in self-defence fired at them. Mutiullah appellant and Ajmal accused took their position near the shop of Muhammad Hanif while some accused went to the Chaubara of Malik Akhtar and the other accused took places near the wall of shop of Malik Akhtar. The firing between the parties continued for about 30 minutes. The firing resorted by the accused hit on the door, windows and walls of the shop of the complainant. The accused were requested by persons from the Grain Market to restrain from firing, whereupon they did so and left the place of occurrence alongwith their weapons. Thereafter, the complainant came out of his shop and saw Sanaullah deceased had succumbed to the injuries while Aziz Khan (P. W. 11) was injured. The glass-panes of the complainant's shop were broken into pieces. Muhammad Yousaf P.W. (not produced) approached the complainant and told the complainant that his father Haji Abdul Aziz had received a pellet shot at the hands of Mutiullah accused and as a result thereof died in his shop. Leaving the P.Ws. with the dead bodies, the complainant left for the police station to lodge the report.

6. Allah Yar, Sub-inspector (P.W.13) after recording the F.I.R. arrived at the spot and prepared injury statement Exh.P.X. and inquest report Exh.P.Y. in respect of dead body of Sanaullah deceased. Injury statement Exh.P.Z. and inquest report Exh.P.AA. was prepared in respect of dead body of Haji Abdul Aziz and both the dead bodies were sent for post-mortem examination under the escort of Ameer Abdullah F.C. (P.W.5). Blood-stained sand and cement was collected from the place where the dead body of Haji Abdul Aziz was lying. It wits made into a sealed parcel and taken into possession vide recovery memo. Exh.P.Q.). Two crime-empties (Exh.P.9/1-2) of .12 bore were taken into possession from the place where Sher Dil accused is stated to have fired at Sanaullah deceased. They were made into a sealed parcel and taken into possession vide memo. (Exh.P.R.). He took into possession 20 .12 bore empties (Exh.P.10/1-20) scattered in front of the eastern shops in the area of Ghalla Mandi vide memo. Exh.P.S.). Three empties of .7 mm bore (Exh.P.11/1-3) were taken into possession from the place where Mutiullah appellant is stated to have fired at Haji Abdul Aziz. They were made into a sealed parcel and taken into possession vide memo. Exh.P.T. In

course of spot inspection he took out 11 pellets which were embedded in the wall of the Arrhat shop of the complainant vide recovery memo. Exh.P.U. Broken glass pieces from the shop of the complainant were taken into possession vide recovery memo. Exh.P.V. Sixty photographs of the place of occurrence were prepared and taken into possession vide memo. EXh.P.DD. These recoveries were attested by Allah Yar (P.W.13) Slier Bahadur and Falak Sher (given up).

7. All the accused named in the F.I.R. were avoiding arrest and appearance before the police. As such the investigating officer on 21-3-1987 moved an application before the Court for issuance of non-bailable warrants. This application is Exh.P.EE. The warrant of Mutiullah appellant Exh.P.L./1 was issued on 21-3-1987 and Abdul Rehman (P.W.9) has reported vide report Exh.P.M./1 dated 28-3-1987 that the accused was not traceable. The proclamation of Mutiullah (Exh.P.O./1) was issued on 29-3-1987. Similarly the warrant of Khuda Yar appellant (Exh.P.L/8) was issued on 21-3-1987 and Abdul Rehman (P.W.9) vide report Exh.P.M./8 stated that the accused was not traceable. This report is dated 28-3-1987. Proclamation against Khuda Yar accused was issued on 29-3-1987 which is Exh.P.O./8. However, both the appellants appeared within the stipulated time on 13-4-1987 and courted arrest. Similarly the other acquitted accused also appeared before the police on 13-4-1987 within the stipulated time. They were produced by Mushtaq Ahmad Khan before Malik Sher Muhammad, Inspector, C.I.A., Mianwali (P.W.14).

8. On 13-4-1987 Khuda Yar appellant produced one .12 bore gun Exh.P.14. It was unlicensed. It was made into a sealed parcel and taken into possession vide recovery memo. Exh.P.FF. On the same day Mutiullah appellant produced .7 mm rifle Exh.P.22 and its licence Exh.P.23. It was made into a sealed parcel and taken into possession vide memo. EXh.P.MM. Similarly, the acquitted accused Zafar produced .7 mm rifle Exh.P.15. Asad accused produced 12 bore gun Exh.P.16, Muhammad Akmal produced .7 mm rifle Exh.P.17, Muhammad Ajmal produced .12 bore gun Exh.P.18 and licence Exh.P.19. Akram produced .12 bore gun Exh.P.20 and its licence Exh.P.21. Slier Dil produced .7 mm rifle Exh.P.24 and its licence Exh.P.25. All these weapons were taken into possession and made into a sealed parcel and were secured vide memo. Exhs.P.GG, P.HH, P.JJ, P.KK, P.L.L. and P.NN, respectively. All these recoveries were attested by Faiz Muhammad, Sub Inspector (not produced) and Muhammad Akram, A.S.-I. (not produced) and Slier Muhammad, Inspector (P.W. 14). On 25-4-1987 Samiullah accused, while in custody of police, led to the recovery of unlicensed .12 bore gun Exh.P.26 from his house. It was taken into possession vide recovery memo, Exh.P.OO. This recovery memo was attested by Malik Sher Muhammad, Inspector, C.I.A., (P.W 14) and Muhammad Akram A.S.-I. and Gul Khan, Constable (not produced) Two crime-empties of .12 bore, three crime-empties of .7 mm were only sent to the Forensic Science Laboratory on 4-3-1987 through Ameer Abdullah Khan, Constable (P.W.5) while the weapons were sent to the Forensic Science Laboratory on 4-5-1987 through Atta Muhammad, Constable (P.W.8) vide report Exh.P.SS of the Forensic Science Laboratory crime-empties EXh.C.1 and Exh.C.2 were wedded with the .12 bore gun EXh.P.14 recovered from Khuda Yar appellant while the remaining weapons did not wed. The three .7 mm crime-empties did not wed with the weapons recovered from the accused. The blood-stained earth was found stained with blood vide report Exh.P.QQ of the Chemical Examiner and vide report of the Serologist

(Exh.P.RR) the said blood wits human. After completion of the investigation the accused were challaned and sent up for trial. The prosecution produced 14 witnesses to prove the charge.

9. Dr. Mumtaz Khan, Medical Officer, District Headquarters Hospital, Mianwali appeared as P.W.2 and stated that on 26-2-1987 at 9-00 a.m. he medically examined Aziz Khan aged 24 years and found the following injuries on his person:

- (1) An entrance wound of fire-arm 1/2 c.m. x 1/2 c.m., over the left cheek 3 c.m. below the eye and 5 c.m. from ear.
- (2) A bruise over the left leg, on outer side 1/2 c.m. x 1/2 c.m., 5 c.m., below the knee.

Both the injuries were kept under observation and vide report Exh.P.P. and Exh.P.C./1 they were declared to be simple. Injury No.1 was by fire-arm while injury No.2 was with blunt weapon. On the same day at 10-00 a.m. he performed autopsy on the dead body of Sanaullah deceased aged 25 years and found the following injury on his person:

- (1) A fire-arm wound of entry 1 /2 c. m. round, margin showed no blackening or burning on the front of chest 1 c.m. from mid line and 10 c.m. of left nipple. 6 c.m. below the inner end of left clavicle.

In his opinion death was due to haemorrhage and shock as a result of he said injury which was caused by fire-arm and was ante-mortem and sufficient to cause death in the ordinary course of nature. A distorted pellet was recovered from the dead body. The time between the injury and death was immediate while that between death and post-mortem was 18 to 24 hours. On the same day at 11-30 a.m. he performed autopsy on the dead body of Haji Abdul Aziz aged 52 years and found the following injuries on his person:

- (1) An entry wound of firearm 2 c.m. x 1 c.m. on the back of right side of chest 3 c.m. from mid line and 5 c.m. from lower end of scapula.
- (2) Corresponding wound of exit 3-1/2 c.m. x 2 c.m. over the front of chest in the base of involving the sternum.

In his opinion the death was due to internal haemorrhage and shock caused by injuries Nos. 1 and 2 which were due to fire-arm. Both the injuries were ante mortem and were sufficient to cause death in the ordinary course of nature. The time between injuries and death was immediate while that between death and post-mortem was 18 to 24 hours.

10. Mutiullah appellant was examined under section 342, Cr.P.C. and stated that Samiullah co-accused was his brother and the other co-accused were not related to him. He pleaded that he has been involved because of enmity and party faction and is innocent. Khuda Yar appellant was examined under section 342 Cr.P.C. and he denied his relationship with Mutiullah co-accused. He has stated that he had fired two shots in

his self-defence and the crime empties EXh.P.9/1-2 were left by him at the spot. He has made a detailed statement which is reproduced as under:--

"On 25-2-1987 at about 12-00 noon, I alongwith Ramzan Dhapal were proceeding to the shop of Mutiullah accused when Abdur Rehman P.W. alongwith Sanaullah deceased and 10/11 other persons armed with fire arm were present at the shop of Malik Feroze Khan but lie himself was not there. Sanaullah deceased abused us and fired at us. I sustained injury on my thigh. I and Ramzan Dhabal in self-defence fired at them. No other accused was present there nor the other eye-witnesses were present. During the firing some persons fired from the shop of Muhammad Iqbal. I took refuge behind the wall of the gate and the firing continued till the police reached there and dissuaded the complainant party not to fire at us. I was also medically examined."

In his defence he has produced Dr Safdar Khan as D.W.1 who has stated that on 28-2-1988 he at 10-35 a.m. medically examined Khuda Yar appellant and found (lie following injuries on his person:--

- (1) A partially healed oval shape lacerated wound 0.5 c.m. x 0.5 c.m. in diameter on the inner side of left thigh, 12 c.m. above the medial condyle of femer. There was sinking of hair in the wound. It was a wound of entrance and was septic.
- (2) A partially healed lacerated wound 1 c.m. x 0.5 c.m. in diameter, oblonge in shape over the inner side of medial surface of left thigh. 6 c.m. above and front of injury No. 1. 10 c.m. above the medial condyle of femer. There was tenderness between injury No. 1 and injury No.2, which proved communication between both the, injuries. On palpation nothing was palpable between the two injuries. It was wound of exit and it was also septic.

In his opinion both the injuries were simple caused within the duration of four days.

11. With the assistance-of learned counsel for the appellant we have gone through the entire evidence and the record of the case has been perused and scrutinised and the arguments of the parties have been heard at length. Similarly learned counsel in Criminal Appeal No. 1243 of 1988 and Criminal Revision No. 713 of 1988 have also been heard at length.

12. It is in evidence that Muhammad Ajmal, Muhammad Akmal. Muhammad Ashraf and Sher Dil are real brothers inter se while Mutiullah anti Samiullah are real brothers. Muhammad Aslam is son of the sister of Sher Dil accused. Zafar accused is cousin of Mutiullah while Akram accused is son o1 cousin of Mutiullah accused and that Khuda Yar is a friend of Mutiullah accused. However, in his statement under section 342, Cr.P.C. Khuda Yar has denied that he is friend of Mutiullah, while Mutiullah has admitted to the extent that Samiullah is his brother and has denied his relationship with his co-accused. On the other hand it is admitted that Falak Sher P.W. is the paternal uncle of Aziz Khan (P.W.) Abdul Rehman (P.W.) is tenant of the complainant. Sher Bahadur (P.W.) is uncle of Aziz Khan (P.W.) and that Sanaullah deceased is the cousin of Aziz Khan (P.W.). Aziz Khan (P.W.) is also politically allied with the complainant

and is his close friend. Haji Abdul Aziz is father of Yousaf P.W. (not produced) and is not related to the complainant. It is also an admitted, fact that father of the complainant was elected as M.P.A. twice. He remained Chairman of the District Council, Mianwali and that Sher Dil and other accused related to him had opposed father of the complainant in the election of the District Council and the Provincial Assembly and that they were deadly opposed as political rivals. It is also an admitted fact that family of the complainant is financially well off, they are landlords of the area, politically well connected and that they have two lawyers in the family and some persons in the family are holding posts of Sessions Judges in the judiciary. It is also admitted that after the occurrence father of the complainant and his cousin Malik Zulfiqar Ali, Advocate arrived at the place of occurrence and that his father had asked the Sub-Inspector to record the F.I.R. Thus, it is 'evident that the F.I.R. was recorded after due deliberations. It is also admitted that there is criminal litigation between the parties and that on the day of occurrence Mutiullah and Khuda Yar were on pre-arrest bail in the case wherein they had assaulted Muhammad Iqbal Arrhti. It is admitted by the complainant that he was feeling aggrieved after this act and conduct of the accused/appellant. It is also admitted fact that the complainant owns 2 shops at the place of occurrence. One in which he was conducting the Arrhat business and one in which he sells arms and ammunition and it is also an admitted fact that he took protection in his arms and ammunition shop and resorted to firing with a .12 bore short-gun and the police did not bother to take that gun or the crime-empties into possession. It is also case of the complainant that his father had launched a complaint with the higher authorities that the police had detained the accused persons in the police station for about one and a half month and was not showing their arrest. It has also been admitted by P.W.13 that he did not ask the complainant to produce his gun with which he had fired nor could he give any reason for not making twenty empties (Exh.P.10/1-20) into a sealed parcel and for not sending them to the Forensic Science Laboratory. It is also the case of the prosecution that all the accused fired at the complainant party indiscriminately and the complainant also in retaliation fired shot. The natural analysis from this evidence on record flows that on the day of occurrence there was a pitched cross-firing between the parties and naturally the F.I.R. was recorded after due deliberations and considerations against the persons whom the complainant wanted to be involved but that does not, necessarily, mean that all innocent persons had been involved. Some chaff has been sifted from the grain by the learned Trial Court and the benefit of acquittal by way of doubt has been extended while in light of the present evidence it is out duty to assessee the evidence against the present two appellants.

13. No doubt that motive is a double-edged weapon. It is an incentive for the accused to commit an offence as well as an opportunity for the complainant to implicate such persons. This is so true in the case of Mutiullah appellant wherein the complainant party had strong motive to implicate Mutiullah in the present occurrence as in the recent occurrence of Iqbal Arrhti he had been allowed pre-arrest bail and the complainant party could not digest his so moving about after, having beaten Iqbal Arrhti. Be that as it may, motive alone is not sufficient to sustain conviction. In absence of other incriminating evidence it would be difficult for us to say that Mutiullah appellant has been rightly held guilty by the learned trial Court. His .7 mm rifle Exh.P.22 was sent for comparison test to the Forensic Science Laboratory but the three .7 mm crime empties Exh.P.11/1-3 were not found wedded with this rifle.

Furthermore, the injury on the person of Sanaullah deceased for which he stands convicted does not appear to be an injury with .7 mm bullet because a distorted pellet was recovered from the body of the said deceased. Khuda Yar appellant whose gun has been wedded with the crime-empties Exh.P.A./1-2 are of .12 bore weapon and thus the case of Mutiullah is distinguishable and does not appear to have been proved beyond reasonable doubt and the natural consequence which flows from this discussion and observations is that the impugned conviction and sentence of Matiullah on all the charges is set aside. He is given the benefit of doubt and acquitted of all the charges. His rifle (Exh.P.22) and licence (Exh.P.23) shall be returned to him as and when he applied for their possession. He shall be set at liberty forthwith if not required to be detained in any other case.

14. As far as the case against Khuda Yar Appellant is concerned, he has taken the plea of self-defence and stated that he received an injury on his thigh. Having gone through the medical report proved by D.W.1 we feel perturbed in accepting this injury to have been caused by the fire of the complainant side. The reason being that the entry and the exit wound are almost at the same level and has not touched the thigh bone and is just passing through the soft issue. It would not be loud thinking if it is presumed that this injury could be a self suffered injury as the appellant did not get himself medically examined on 25-2-1987, the date of occurrence, from the District Headquarters Hospital, Mianwali but instead opted himself to be examined at Primary Health Centre, Kundian on 28-2-1987. Furthermore, keeping in view the seat of the injury and the fact that the place where the accused was is at a considerable place where the complainant party was and they were facing each other, this injury could not be caused in the manner alleged. Even if it is presumed to be a fire-arm injury and not a self-suffered then keeping in view the seat c ' the injury there is a possibility that the accused appellant may have receive" this injury from the firing of one of his party men, and thus, the accused is taking advantage and made a specific statement regarding his involvement in the occurrence. Be that as it may, his .12 bore gun (Exh.P.14) being unlicensed was found wedded with the crime-empties (Exh.P.9/1-2) by the report of the Forensic Science Laboratory, Lahore and that Sanaullah deceased) carries a .12 bore weapon injury while Aziz Khan (P.W.) also carries a pellet injury. Thus, his complicity with the offence cannot be ruled out and, thus, conviction under section 302, P.P.C. and under section 307, P.P.C. is maintained but the death sentence awarded to him is not confirmed. Instead it is converted to imprisonment for life. His sentence under section 307, P.P.C. as awarded by the learned Trial Court is maintained. The sentence of fine awarded to Khuda Yar appellant under sections 302 and 307, P.P.C. is also maintained and the punishment in default of payment shall also be undergone as ordered by the learned trial Court. However, i l' the fine is recovered, the entire amount of recovered fine shall be paid to the heirs of Sanaullah deceased. Both the sentences of imprisonment shall run concurrently and he is extended the benefit of section 382-B, Cr.P.C. So far as conviction under section 440, P.P.C. is concerned, the said conviction and sentence awarded to him under the impugned judgment is set aside and he is acquitted of the charge under section 440, P.P.C.

15. The appeal against acquittal and the revision petition being devoid of force are dismissed, accordingly. With these observations and modifications the appeals and the revision petition are decided accordingly.

N.H.Q./M-410/L----- Order accordingly