

**Final is in the USB of Honourable Mr. Justice  
Muhammad Iqbal Kalhoro**

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT,  
HYDERABAD.**

Criminal Appeal No.D-09 of 2014  
Confirmation Case No.D-03 of 2014

*Present:-*

*Mr. Justice Muhammad Iqbal Kalhoro.*  
*Mr. Justice Khadim Hussain M. Shaikh.*

Date of hearing: 08.11.2017

Date of decision: 08.11.2017

Appellant: Mohbat Ali through Mr. Aijaz Shaikh, Advocate.  
Complainant: Izat Khan through Mr. Abdul Hameed Bajwa,  
Advocate.  
The State: Through Syed Meeral Shah Bukhari Addl.P.G.

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**J U D G M E N T**

**MUHAMMAD IQBAL KALHORO,J:-**The appellant has impugned the judgment dated 08.01.2014 passed by Sessions Judge, Badin whereby he has been convicted under section 302(b) PPC and sentenced to death. He has also been directed to pay compensation of Rs.2,00,000/- to the legal heirs of the deceased as provided under section 544-A Cr.P.C and on default whereof to suffer S.I for two years more.

2. The brief facts of the prosecution case are that on 06.10.2011 at 1810 hours, complainant Izat Khan lodged an FIR stating therein that Mohbat Ali (the appellant) had purchased a calf from his cousin Shahnawaz on credit for a total consideration of Rs.45,000/- to be paid on 15.09.2011. But, he failed to pay the same on the said date and on demand by

Shahnawaz, he (Mohbat Ali) exchanged hot words with him. On 04.10.2011 at about 7:00 p.m. complainant Izat Khan, his cousins Shahnawaz and Khalid Hussain both sons of Shaikhoo Khan Kaloi and Muhammad Azam son of Manthar Ali Kaloi went to the “Khara” of chilies, where Mohbat Ali was sitting on a cot, Shahnawaz demanded amount of the calf from him, but he got annoyed, exchanged hot words and then took out a pistol from his fold and within their sight fired at his cousin Shahnawaz, who received the said shot and fell down on the ground, while Mohbat Ali ran away along-with the pistol. Complainant party saw that Shahnawaz was having pellets injuries on left side of his chest below nipple wherefrom blood was oozing, and he was unconscious. He was taken to Tando Ghulam Ali Hospital but on the way he succumbed to the injuries and died.

3. After registration of the F.I.R., the police started investigation and arrested appellant on 07.10.2011. After completing due formalities, the challan against him was submitted. Finally, the trial against the appellant commenced, during which a formal charge was framed against him at Ex.4, he pleaded not guilty and opted to contest the charge.

4. In the trial, the prosecution has examined P.W-1 Complainant Izat Khan as Ex.6, P.W-2 Khalid Hussain as Ex.7, P.W-3 Mansing as Ex.9, P.W-4 M.O Dr. Dolat Khan as Ex.10, P.W-5 PC Ahmed as Ex.11, P.W-6 PC Muhammad Ashraf as Ex.12, P.W-7 Muhammad Azam as Ex.13 and P.W-8 ASI Jan Muhammad Pitafi as Ex.14. In their respective evidence, they have produced all the necessary documents viz. F.I.R., mashirnama of arrest of accused, mashirnama of recovery of crime weapon, mashirnama of dead body, medical record, mashirnama of place of incident, postmortem report, etc. Whereafter prosecution closed its side vide Ex.15.

5. Statement of the appellant was recorded under section 342 Cr.P.C in which he has denied the allegations and has professed innocence. Neither he has examined himself on oath nor examined any witness in his defense. The learned trial Court after concluding the evidence and hearing the parties convicted the appellant in the terms as stated above.

6. Mr. Aijaz Shaikh learned Counsel for the appellant has contended that there is delay of two days in registration of the F.I.R. which has not been properly explained and it has made the entire case as doubtful; that the alleged recovery of the pistol from the appellant was effected from an open plot, which was not in exclusive possession of the appellant, therefore, such recovery cannot be used against him; that from the place of incident no empty was recovered but strangely in FSL report one crime empty is shown to have been examined, as if the same was recovered from the spot; that the appellant has been acquitted in the case of alleged recovery of the crime weapon from him; that there is a conflict in medical and ocular evidence as the witnesses have alleged that only a single fire was made by the appellant but in the postmortem report 05 gunshot wounds have been shown on the person of the deceased, which has rendered the prosecution case doubtful; that the fired pellets were neither recovered from the place of incident nor from the dead body of the deceased, which would show that the place of incident as shown by the prosecution is not the actual spot of the incident and that the deceased died at some other place but a false story was contrived to implicate the appellant; that the motive alleged by the prosecution is weak and has not been established; that record reflects that the complainant party came at the spot and engaged in hot words with the appellant and only thereafter he allegedly made a fire, which situation would mitigate the crime allegedly committed by him; that initially the N.C report of the incident was recorded at the Police Station but the name of the appellant was not mentioned therein, which would show that only after deliberation and consultation, his name was inserted in the F.I.R.; that on the next day a news in a sindhi newspaper about the incident was flashed disclosing that some unknown culprits had committed murder of the deceased and if this news is seen in juxtaposition of the delay in registration of the F.I.R., it would make the case against the appellant to be false and fabricated. Learned Counsel in support of his arguments has relied upon the case law reported as (1) 2017 P.Cr.L.J 114 (2) 1972 SCMR74, (3) 2017 SCMR 596, (4) 2008 SCMR 1572, (5) 1995 SCMR 127 and (6) 2003 SCMR150.

7. On the other hand learned A.P.G and the Counsel for the complainant have submitted that the delay in registration of the F.I.R. is fully explained that after completing funeral of the deceased, the complainant appeared at Police Station and got the F.I.R. registered. Added, it is a matter of record that on the very day of the incident the complainant had communicated the information to the police, which has been confirmed by the police officials in their evidence, but they failed to mention the said facts in the relevant documents; that failure of the police to reduce the information of the murder of the deceased into a book kept under section 154, Cr.P.C or to mention the name of appellant in daily diary would not make the evidence of the eye-witnesses shorn of its intrinsic value; that the witnesses have fully supported the prosecution case on all material facts and there are no contradictions; that there is no prospect of deliberation and false implication as except the appellant no one is arraigned as an accused in the case; that only one perpetrator i.e the appellant has been nominated in the F.I.R. with specific role of firing a single fatal shot at the deceased; that there is no contradiction in medical and ocular evidence as Medico Legal Officer in his evidence has explained that all the five gunshot wounds were caused by a single fire; that there are only minor contradictions which have occurred due to lapse of a long time between the incident and the evidence; that evidence of the P.Ws on all salient features of the case is coherent and consistent. In support of their arguments, they have relied upon the case law reported as (1) 2007 YLR 854, (2) 2016 YLR Note 61 and (3) 217 SCMR 388.

8. We have considered the submissions of the parties and have perused the material available on record and have taken the guidance from the case law relied at bar. The prosecution in all has examined eight (08) witnesses. P.W-1 Izat Khan (Ex.6) is the complainant as well as an eye witness. In his evidence he has described the entire incident and has specifically deposed that the appellant on demand made by the deceased to pay to him Rs.45,000/- outstanding on account of sale of a calf to him fired at the deceased. P.W-2 Khalid Hussain (Ex.7) is brother of the deceased as well as the eye witness. He has supported the prosecution case as disclosed in the F.I.R. P.W-3 Mansing (Ex.9) is the Tapedar, who has prepared the

sketch of place of incident and in his evidence has produced the same and has pointed out the points where the appellant, deceased and the witnesses were standing at the relevant time. P.W-4 Dolat Khan (Ex.10) is the Medico Legal Officer who conducted postmortem of the deceased and found gunshot injuries on his chest which caused damage to his chest wall, the heart, the left lung and pleura leading to cardiogenic shock resulting in death of the deceased. P.W-5 Ahmed (Ex.11) is the police constable and was posted at P.S Tando Ghulam Ali. He on the day of incident had received information about the incident, as such, he went to the hospital alongwith duty officer ASI Jan Muhammad Pitafi and P.C Pervaiz where necessary formalities including inspection of the dead body and issuing a letter for postmortem were carried out by them. P.W-6 Muhammad Ashraf (Ex.12) is the witness, who was entrusted blood stained earth and clothes of the deceased secured during the investigation for transmitting to the office of Chemical Examiner at Karachi for examination and report. P.W-7 Muhammad Azam (Ex.13) is the eye witness of the incident besides mashir of necessary formalities viz. inspection of dead body, inspection of place of incident, arrest of appellant, recovery of crime weapon from him, etc. P.W-8 Jan Muhammad Pitafi (Ex.14) is the Investigating Officer of the case who on the information of the incident had reached the hospital, completed all the necessary formalities including inspection of dead body, preparing inquest report, issuing a letter for conducting autopsy of the deceased. He has produced FSL report in respect of blood stained earth secured from the place of incident and clothes of the deceased as well as the FSL report of the 12 bore pistol and the crime empty recovered on the pointation of the appellant.

9. All these witnesses have supported the prosecution case. The eye witnesses namely Izat Khan, Khalid Hussain and Muhammad Azam in their evidence have deposed that they alongwith the deceased had gone to the spot on the day of incident where appellant was present and when the deceased demanded the amount of Rs.45,000/-, the sale consideration of a calf, he fired from his pistol at the deceased and fled away. They took the deceased to hospital and informed the police on mobile phone. In the hospital the deceased was pronounced dead. The police also arrived there

and completed the formalities. Their assertions in the evidence have been supported by Medico Legal Officer and the relevant police officials including the Investigating Officer, in their evidence. The eye witnesses have been subjected to a lengthy cross examination but no discrepancy on the material facts has come on record. The parties are already known to each other, therefore, there is no chance of misidentification of the real culprit. These eye witnesses have implicated only one accused who, according to them, fired only once. Their account of the incident is confidence inspiring and does not seem to be suffering from any exaggeration. There is also no question of substitution of the real culprit with the present appellant because not only this phenomenon is rare but also there is no record to suggest that there was any enmity between the parties to give an excuse to the prosecution to falsely implicate the appellant. Even otherwise it is not the case of the appellant that he has been substituted with the real accused. The report of FSL in respect of clothes of the deceased and the blood stained earth taken from the incident is in positive. The place of incident is sketched by the Tapedar who has produced such sketch in his evidence which indicates the points where the appellant, the deceased and the witnesses were available at the time of incident. This position has not been contested by the defense as no relevant question in this connection has been asked from the witnesses in their cross examination. The contention of learned counsel that there is contradiction in between the medical and ocular evidence is also not factually correct because the Medico Legal Officer in his evidence has declared that all the five gunshot wounds shown in the postmortem report were the result of only one fire shot which is exactly the case of the prosecution. As to contention of learned defense Counsel that no crime empty was recovered from the spot but in the FSL report there is a mention of one, it may be stated that no doubt the crime empty was not recovered from the spot but it was found in the pistol, which is country-made, at the time of its recovery from the appellant on 07.10.2011 as is evident in the memo of recovery and was sent alongwith the pistol for FSL report.

10. As to delay in registration of the F.I.R., we would like to state that mere delay in recording of the F.I.R. per se would not be considered fatal

to the prosecution case, unless it has been established that the F.I.R. is the result of some consultation and deliberation. Additionally, we have noted from the record that on the very day, the relevant information of the incident was communicated to the police, and thus they arrived at the hospital. The I.O of the case namely ASI Jan Muhammad in his cross examination has revealed that in the hospital the complainant had disclosed the name of the appellant but he did not put it down in the entry. In our estimation, the failure of the police to perform its duty attentively and diligently after receiving information of the incident and reducing it into book under section 154, Cr.P.C would not reflect adversely on the intrinsic value of the evidence of the eye-witnesses relating to role of the appellant, his arrest and recovery of crime weapon from him. Learned Counsel for the appellant in his arguments emphasized that since the appellant has been acquitted in a case registered against him for alleged recovery of the crime weapon, therefore, the present case has become doubtful. We, however, do not feel persuaded by such contention, for, the acquittal in the case of recovery of crime weapon would merely mean that the prosecution was not able to prove the possession and recovery of the said weapon on the particular day from the appellant. It would not, however, lead to a conclusion that the said weapon was not used by the appellant in the crime. Acquittal of the accused in the case of recovery of a weapon connected with a murder case, would suggest that the manner, time and place in which the recovery is shown to have been effected on a particular day could not be established by the prosecution. In view of above discussion, it is obvious that the prosecution has established its case against the appellant beyond a reasonable doubt.

11. However, we have noted that there are certain points which could be considered as mitigating circumstances in favour of the appellant. For instance, the appellant had not launched the attack on the deceased first but the complainant party had come at the place of incident on its own where the appellant was present and only after exchange of hot words, he made a fire upon the deceased. The incident does not appear to be preplanned or premeditated. Although the prosecution has alleged the motive but it has not been able to establish the same. And it is by now a well established



principle of law that when the motive is alleged by the prosecution but it fails to establish the same, it could be considered a mitigating circumstance to convert death penalty into imprisonment for life. The appellant in his statement under section 342, Cr.P.C recorded on 07.12.2013 is shown to be aged about 23 years and going by such calculation it is obvious that he is still young and deserves a lenient view. In favour of forming a view as above, reliance can be placed on the cases of *GHULAM SABIR v. THE STATE* (2017 SCMR 807), *QURBAN HUSSAIN v. THE STATE* (2017 SCMR 880), *ZAHOOOR AHMED v. The STATE* (2017 SCMR 1662), *ZAFAR IQBAL alias ZAFARULLAH KHAN v. THE STATE* (2017 SCMR1721) and *ALLAH WASAYA and another v. THE STATE* (2017 SCMR1797).

12. Considering all the above facts and circumstances, we are of the view that the death penalty to appellant would not be justified. Therefore, we dispose of this appeal in the terms whereby the death penalty awarded to appellant through impugned judgment is converted into imprisonment for life under section 302 (b) PPC as Tazir. The appellant shall pay Rs.2,00,000/- as compensation to the legal heirs of deceased as provided under section 544-A, Cr.P.C and on default to further suffer R.I for 01 year. The benefit of Section 382-B Cr.P.C is extended to the appellant.

13. Resultantly, the death reference No.D-03/2014 for confirmation of death sentence of appellant is replied in negative and is accordingly disposed of. These are the reasons of our short order dated 08.11.2017.

JUDGE

JUDGE

Ali Haider