

THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

**Criminal Appeal No.D-01 of 2020
Criminal Appeal No.D-104 of 2020
Confirmation Case No.01 of 2020**

Present

Mr. Justice Muhammad IqbalKalhoro

Mr. Justice Muhammad SaleemJessar

Date of hearing: 18.10.2022

Date of decision: 18.10.2022

Appellant: Murtaza through Mr. Shabeer Hussain Memon,
advocate.

Complainant: Nemo.

The State: Through Mr. Abdul WaheedBijarani, Assistant
Prosecutor General, Sindh.

JUDGMENT

MUHAMMAD IQBALKALHORO, J:-Appellant Murtazastood a trial in Sessions Case No.110 of 2019, arising out of Crime No.35/2019, PS BhanSaeedabad, District Jamshoro u/s 302, 34 PPC for murdering Abdul Razzakby making a straight fire with a pistol on his neck,alongwith co-accusednear village RahmatullahSehro on 23.03.2019 at 1730 hours, and has been convicted vide impugned judgment dated28.12.2019 by learned Additional Sessions JudgeSehwanin the terms as stated below.

“I, therefore, convict accused Murtaza under section 265-H(2) Cr.P.C., for the commission of offence under section 302(b) PPC and sentence him to death, subject to confirmation of Honourable High Court of Sindh, Circuit Court, Hyderabad and to pay fine of Rs.2,00,000/- (Two Lac). In case of default to pay fine, the accused shall suffer S.I. for six months more. Accused shall be hanged by neck till he is dead.”

2. He also stood a trial in Sessions Case No.109 of 2019, arising out of Crime No.38/2019, PS BhanSaeedabad, District Jamshoro u/s 25 Sindh Arms Act, 2013 for recovery of an unlicensed pistol (crime weapon), and has been convictedby the same Court vide impugned

judgment dated 28.12.2019 to suffer RI for 07 years and to pay fine of Rs.20,000/- in default whereof to suffer SI for two months more. Benefit of section 382-B CrPC has been extended to him.

3. Aggrieved by said judgments, he has filed instant appeals. Learned defence counsel after arguing at some length has submitted that he would not press these appeals on merits, if sentence of the appellant is altered from death penalty to imprisonment for life as this is a case of a single shot only to deceased without any repetition by appellant. To bring home his point, he has relied upon 2017 SCMR 2024. Learned APG has not opposed his request in view of ratio laid down in the aforesaid case.

4. We have heard the parties and perused material available on record. In the trial, prosecution has examined eight witnesses including complainant, Medical Officer, Tapedar, Investigation Officer, Mashir etc. and has produced through them all the relevant documents: FIR, post-mortem report, relevant entries, etc. When such evidence was put to the appellant u/s 342 CrPC for his explanation, he has simply denied it without however examining himself on oath or leading any evidence in defence.

5. Complainant, who happens to be uncle of deceased in his evidence (Ex.3) has described the whole incident as narrated by him in FIR that on 19.03.2019 during marriage ceremony of a daughter of his cousin, his nephew Abdul Razzaq had restrained the appellant to enter the house where ladies were present, on which he got annoyed and issued threats of taking revenge on this score. On the fateful day i.e. 23.03.2019 he was returning to his home from his lands at about 05:30 pm along with deceased Abdul Razzaq, nephew Usman and son-in-law Wazir Rodrani and reached near Village Rehmatullah, appellant along with co-accused armed with repeater and pistol accosted them. After hurling abuses, appellant Murtaza made a direct fire from his pistol upon deceased Abdul Razzaq hitting his neck as a result he expired on the spot. He informed the police accordingly and shifted the dead body to hospital for post-mortem. On 24.03.2019, after burial of dead body, he appeared at Police Station and registered FIR.

6. Wazir, PW-2, (Ex.4), brother-in-law of deceased, in his evidence has supported the complainant. He was also with the deceased

at the time of incident like the complainant and has, in detail, harped on the role played by appellant: that he was armed with a pistol and fired upon Abdul Razzak which hit him on his neck/throat. They both have identified the appellant, already known to them. In their cross-examination, lengthy albeit, nothing substantial favorable to appellant over main features of incident has come on record. Zahid Hussain, PW-3, (Ex.5), Mashir, in his evidence has deposed that on 23.03.2019 ASI Ghulam Murtaza inspected dead body of deceased Abdul Razzak at hospital in his presence and co-mashir Dodo, and prepared such memo. He has also confirmed recovery of crime weapon on pointation of the appellant.

7. Investigation Officer, examined as PW-4 (Ex.6), has confirmed inspecting place of incident, recording statements of witnesses and arresting accused on 27.03.2019. He has further affirmed that appellant had led the police, in presence of Mashirs, to graveyard of Ibrahim Shah and took out a pistol wrapped in a plastic shopper buried in earth under a "Khbar" tree having two live bullets in its magazine. He has also stated in clear words that he had sealed the crime weapon and sent it for lab report. And as a result of such recovery he had registered a separate FIR bearing Crime No.38 of 2019 u/s 25 (a) Sindh Arms Act, 2013 at P.S. Bhan Saeedabad. The record further shows that in the investigation, blood stained earth and one empty shell from the spot were also collected by the I.O. regarding which positive reports of chemical examiner (Ex.6/G& 6/I) are available on record. Tapedar PW-5 (Ex.7) had visited site in presence of complainant and prepared its sketch which has also been produced in the trial. Medico-Legal Officer, PW-6 (Ex.8) has verified the injury on the person of deceased and has opined that cause of his death was shock and hemorrhage and rupture of lungs by firearm. SIP Ghulam Murtaza PW.7 (Ex.9) has confirmed preparation of Lash Chakas Form and Danishnama. PW.8 Muhammad Qabil Judicial Magistrate (Ex.10) has deposed that on 01.04.2019 appellant had voluntarily made confessional statement before him, which he has produced as Ex.10/B. All these pieces of evidence are parts of the prosecution case.

8. When we take a collective view of such evidence available on record, it becomes clear that prosecution has been able to prove the case against appellant beyond a reasonable doubt. Evidence of eye witnesses,

Medico-Legal Officer, Mashirs and Investigating Officer supportsuch features of the case relevant to the role performed by them in the case. They have infactcomplemented each other qua prosecution's versionof the incident and nothing is left out of sight clouding the slightest part in the story. During cross-examination of witnesses,no material contradiction has come on record which may create a doubt over veracity of prosecution story.The defence has failed to bring on record any material which may be considered to have prompted the complainant to implicate the appellant falsely in themurder of nephew by substituting the real culprit. There is also a judicial confession made by appellant before Judicial Magistrate Sehwan on 01.04.2019 which although he has retracted in his statement u/s 342 CrPC but if the same is seen in backdrop of entire evidence discussed above, appears to ring true. When the entire evidence was put to the appellant for his explanation, he has simply pleaded his innocence and in support has stated that complainant party has enmity with Maharcommunity and deceased had been murdered by them.However no proof to that effect has been brought on record by him.

9. We therefore, find no illegality in the impugned judgment as far as declaration of guilt/convictionof the appellant is concerned. Nonetheless, we are of the view that this is a case of a single fire-shotupon the deceased by the appellant without any effort on his part to repeat it, although the deceased was at his mercy, nor it i.e. repeating the act of fire or any such attempt by the appellant has been alleged by the eye witnesses. The motive part of the story that there was a dispute over entering the house during a marriage ceremony between the deceased and appellant, alleged by the prosecution,is shrouded in mystery and has not been proved. We, therefore, are ofthe view that this is not a fit case of capital punishment, and this appears to be the reason why learned APG has not opposed alteration of sentence of the appellant.

10. Consequently, while following dictum laid down in the case of Fayyaz alias Fiazi versus The State (Supra),we maintain convictionof the appellant u/s 302(b) PPC, but alter his sentence of death and reduce it to imprisonment for life. Rs.200,000/- to be paid by appellant as fine is converted into compensation u/s 544-C CrPC as Section 302(b) PPC does not stipulate any provision of fine, its default shall expose appellant to further SI for six months, however, benefit of Section 382-B CrPCis

extended to him. With such modification in the quantum of sentence of appellant Murtaza s/o Photo, Criminal Appeal No.D-01/2020 is dismissed and Criminal Appeal No.D-104/2020 is dismissed as not pressed. Both the sentences awarded to the appellant shall run concurrently. Consequently, death reference is hereby replied in negative and accordingly disposed of.

11. Both the appeals are disposed of accordingly.

JUDGE

J U D G E

Irfan Ali