

340

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

Cr. Appeal No.D-70 of 2015
Confirmation Case No.09 of 2015

Cr. Appeal No.D-74 of 2015

DATE	ORDER WITH SIGNATURE OF JUDGE(s)
------	----------------------------------

22.02.2023

Mr. Wazeer Hussain Khoso, Advocate for appellant(s).

Mr. Mir Naeem Akhtar Talpur, Advocate for complainant.

Mr. Shahzado Saleem Nahiyoona, Addl. P.G Sindh.

=

We have heard the learned counsel for appellant(s), learned counsel for complainant and learned A.P.G. Reserved for judgment.

Hafiz Fahad

IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABADBefore:Mr. Justice Mohammad Karim Khan Agha
Justice Mrs. Kausar Sultana Hussain

1. Cr. Appeal No.D- 70 of 2015
[Confirmation Case No. 09 of 2015]

Wazir Ali

Versus

The State

2. Cr. Appeal No.D- 74 of 2015

Wazir Ali

Versus

The State

Appellant : Wazir Ali S/o Muhammad Essa Bhatti	through Mr. Wazeer Hussain Khoso Advocate
Respondent : The State	through Mr. Shahzado Saleem Nahiyoan, Additional Prosecutor General, Sindh
Complainant : Khair Muhammad (present in person)	through Mir Naeem Akhtar Talpur Advocate
Date of hearing	22.02.2023
Date of judgment	08.03.2023

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.-By this single judgment
we intend to dispose of both the aforementioned Criminal Appeals

342

together as the same relate to one and same incident, however, involve two FIRs one is in respect of main case while other is an offshoot which were tried jointly together by the trial court under Section 21 (m) Anti Terrorism Act 1997(ATA) being a special law which overrode the general law; and, have been filed against the one and same judgment passed by the trial Court.

2. By means of aforementioned Appeals, appellant Wazir Ali has assailed the Judgment dated 31.07.2015, passed by the learned Judge, Anti-Terrorism Court, Mirpurkhas, in Special Case No.19 of 2014 (re: The State V Wazir Ali and others), emanating from Crime No.81 of 2014, under sections 302, 114, 34 PPC and section 6/7 of Anti-Terrorism Act, 1997 and the offshoot/amalgamated Special Case No.20 of 2014 (re: The State V Wazir Ali), culminating from Crime No.82 of 2014, under section 24 Sindh Arms Act, 2013, both FIRs were registered at Police Station Town Mirpurkhas. In both aforementioned cases i.e. Special Case No.19 of 2014 (main case) and the Amalgamated (offshoot) Special Case No.20 of 2014, the appellant Wazir Ali has been convicted and sentenced in the terms, as mentioned in the concluding para i.e. Point No.5 of the impugned judgment, relevant portions thereof are as under:-

“POINT NO.5.

11. *I, therefore, convict the accused Wazir Ali under section 302 (a) PPC and section 7 (a) of Anti-Terrorism Act, 1997 and sentence to death by hanging him by neck till he is dead and to pay a fine of Rs.1,00,000/- (Rupees One Lac) in default of payment of fine to suffer further rigorous imprisonment for 3 (three) years subject to confirmation by the Honourable High Court of Sindh, and acquit accused Mst. Noor Jehan and child accused Sher Ali under section 265-H (1) Cr. P.C. -----.* I also convict the accused Wazir Ali in amalgamated special case No.20 of 2014 and sentence him to suffer rigorous imprisonment for 3 (three) years and to pay a fine of Rs.50,000/- (Rupees Fifty Thousand) in default of payment of fine to suffer further rigorous imprisonment for 6 (six) months under section 24 of Sindh Arms Act, 2013. Benefit of section 382-B Cr.P.C is awarded to the accused as he has remained in jail as under trial prisoner from 16.7.2014 to 31.7.2015. The sentences in both the cases awarded to accused Wazir Ali will run concurrently. -----.”

3. Through said judgment, co-accused Mst. Noor Jehan and child accused Sher Ali in main case i.e. Special Case No.19 of 2014 have been acquitted of the charge, whereas the case against

absconding accused Babar Ali was ordered to be kept on dormant file till his arrest and production before the Court.

4. The prosecution story as stated in both the aforementioned cases are as under:-

"Crime No.81 of 2014 (Special Case No.19/2014).

Complainant Khair Mohammad son of Sahib Dino, Muslim, adult, by caste Unner resident of Siyal colony Mirpurkhas lodged the report at Police Station Town Mirpurkhas on 16.07.2014 at 2230 hours alleging therein that Gul Hassan son of Gul Sher Babar is his real brother. On 20.02.2004 he contracted love marriage with one Mst. Najma D/o Wazeer Bhatti. After marriage, his father Wazeer Bhatti on the plea of illness of her mother took Mst. Najma with him and confined her in his house. My brother Gul Hassan requested him several times but he refused to send her back. Therefore, my brother Gul Hassan moved an application before the Court for her production before the Court of Law. It is alleged that on 15.07.2014 Gharibabad Police recovered Mst. Najma from the custody of her parents and she was produced before the concerned Court on 16.07.2014. Complainant, his brother Gul Hassan, Misri Khan, Dildar went to Sessions Court Mirpurkhas and reached at 1030 hours on first floor before the Court of 3rd Senior Civil Judge Mirpurkhas through the stair case of Sessions Court building, where every one Wazeer Bhatti, Babar Bhatti, Sher Ali son of Wazeer Bhatti and Mst. Noor Jehan W/o Wazeer Bhatti were present. **Mst. Noor Jehan instigated to cause murder of Gul Hassan as Mst. Najma contracted marriage with him without their wish upon which Wazeer Bhatti and Babar Bhatti took out pistol from the fold of shalwar came adjacent to brother Gul Hassan and Wazeer from front and Babar Bhatti fired from back on Gul Hassan.** They raised cries which attracted many persons who had come in Court and accused after firing got down from stair cases along with the arms and run away. Thereafter, complainant saw injured Gul Hassan who had received bullet injuries on his fore head, back and legs. Then they took injured to civil Hospital Mirpurkhas where first aid treatment was provided to him and then he was referred to LMC Hyderabad where during treatment his brother Gul Hassan succumbed due to injuries and expired. Complainant party then returned to Civil Hospital Mirpurkhas where Police also came and after codal formalities took the dead body at the house and after funeral complainant appeared at Police Station and lodged the F.I.R **stating that in furtherance of their common object due to annoyance upon marriage at the instigation of Mst. Noor Jehan, Wazeer Bhatti and Babar Bhatti caused murder of his brother Gul Hassan by firing at him."**

Crime No.82 of 2014 (Amalgamated Special Case No.20/2014).

§

The F.I.R was lodged by complainant Abdul Majeed Nizamani on 17.07.2014 at 1430 hours at Police Station Town Mirpurkhas stating therein that on 16.07.2014, complainant along with subordinate staff went for patrolling in Government Vehicle No.7553 vide entry No.14 at 940 hours and during patrolling when they reached at main gate of Sessions Court Mirpurkhas at 1030 hours, they saw two (02) persons came running from main gate of Sessions Court, out of them one person was armed with pistol and both were apprehended by the police. The persons who were present there disclosed that these accused persons along with others fired upon one Gul Hassan S/o Gul Sher Babar with intention to kill and caused injuries to him in front of Honourable Senior Civil Judge-III, Mirpurkhas on first floor. The relatives of said injured took him to Hospital. On enquiry, the accused disclosed their names as Wazir Bhatti son of Essa by caste Bhatti and Sher Ali son of Wazeer Ali, both residents of Siyal Colony Mirpurkhas. Accused Wazir was inquired about the pistol, who disclosed that this is licensed pistol. The license and pistol were taken into possession and nothing was recovered further. The accused were arrested and such mashirnama of arrest and recovery was prepared. Thereafter, the accused and case property were brought at police station where F.I.R was registered under Section 24 of Sindh Arms Act, 2013 against them."

5. After registration of the F.I.Rs, police arrested the accused (present appellant as well as the acquitted accused), conducted usual investigation and submitted challan before the concerned Court. Then after completing necessary formalities, learned trial Court framed the charge against all arrested accused, to which they pleaded not guilty and claimed trial.

6. The prosecution in order to prove its both cases has examined the complainants of both cases as well as other material PWs / mashirs and the I.Os and exhibited numerous documents and other items. The statements of the accused were recorded under section 342 Cr.P.C whereby they claimed false implication. Accused Wazir Ali and Mst. Noor Jehan both examined themselves on oath and called their daughter Ms Najma their daughter as a DW in support of their defence.

7. Learned trial Court after hearing the learned counsel for the parties and scrutinizing the evidence available on record convicted and sentenced the appellant Wazir Ali as set out in the earlier para but acquitted co-accused Mst.Noor Jehan and Sher Ali. Hence the

345

appellant has filed this appeal against his convictions and sentences.

8. The evidence produced before the trial court finds an elaborate mention in the impugned judgment, therefore, the same is not reproduced here so as to avoid duplication and unnecessary repetition.

9. At the very outset learned counsel for the appellant under instructions of the appellant did not press the appeals on merits as the appellant had admitted his guilt in respect of all offences so charged in both the FIR's and in the impugned judgment and he only sought a reduction in sentence from that of the death penalty to life imprisonment based on the following mitigating factors; (a) that the case did not attract the provisions of the Anti Terrorism Act (ATA), (b) that it was unclear whether it was he or the absconding co-accused who caused the fatal shots on the deceased which lead to his death (c) that the prosecution had asserted a motive but had failed to prove it (d) that the appellant did not carry out his crime with pre meditated intention or design but only did so after being instigated by the appellant's wife and only came armed to the court in order to protect himself (e) that the appellant was seriously ill as he had already lost one kidney and now his other kidney was failing and he was facing dialysis and (f) there were some doubts in the prosecution case but not enough to lead to an acquittal. In support of his contentions he placed reliance on the cases of **Ghulam Mohy-ud-Din alias Haji Babu and others V The State** (2014 SCMR 1034) and **Nazeer Ahmed V The State** (1999 SCMR 396).

10. On the other hand learned APG and learned counsel for the complainant contended that the case fully attracted the death penalty as there were no mitigating factors and only aggravating factors in that; (a) the case attracted the ATA, (b) it was a most brutal murder and (c) the murder took place within the court premises. In support of their contentions they placed reliance on the cases of **Waseem Abbas V The State** (2006 PCr.LJ 550), **Zafar Hussain and 4 others V The State** (2009 PCr.LJ 300), **Muhammad Moosa and others V The State** (2020 PCr.LJ Note

124), **Dadullah and another V The State** (2015 SCMR 856), **Muhammad Javaid alias Jaida V The State** (PLD 1999 Lahore 487), **Saleh Muhammad alias Hashim Marri V The State** (2013 PCr.LJ 692), **Muhammad Bilal V The State and others** (2019 SCMR 1362) and one unreported judgment of this Court passed in **Cr. Jail Appeal No.D- 112 of 2013**.

11. We have considered the arguments of learned counsels as well as the complainant, present in person, scanned the entire evidence available on record with their assistance and considered the relevant law and authorities cited by the learned counsel for the appellant as well as the learned APG and complainant at the bar.

12. At the outset we do not find that any of the offences so charged fell within the purview of the ATA as there was no intention, design or purpose to create terror. Based on the particular facts and circumstances of the case in hand the appellant and his absconding co-accused murdered the deceased **at the instigation** of the acquitted co-accused who was wife of the appellant because the deceased had married her daughter without her permission. As such the design and purpose of the murder was to punish the deceased who had dared to marry acquitted co-accused daughter without her permission and not to create terror. It is irrelevant that the by product of the act was to cause terror as this was not the design or purpose of the appellant. Even other wise based on the particular facts and circumstances of the case it seems to be a case of personal enmity/vendetta whereby the acquitted co-accused was furious with the deceased for marrying her daughter without her permission which lead to her instigating the appellant and absconding co-accused to murder the deceased on account of revenge which type of cases do not fall within the purview of the ATA. In this respect reliance is placed on the case of **Ghulam Hussain V State** (PLD 2020 SC 61).

13. We have also considered the evidence on record which shows that the prosecution has proved its case beyond a reasonable doubt through three eye witnesses to the murder who knew the appellant before the murder who identified the appellant along with his absconding co-accused in broad day light as shooting the deceased

347

on the instigation of his acquitted co-accused's wife none of which eye witnesses was damaged during a lengthy cross examination and thus we find their evidence to be reliable, trust worthy and confidence inspiring and believe the same in respect of the murder of the deceased and the correct identification of the appellant as one of the murderers of the deceased along with his absconding co-accused; that the eye witness evidence is supported by the medical evidence and the pistol recovered from the appellant which lead to a positive FSL report when matched with the empties recovered at the crime scene and as such we up hold all the convictions handed down to the appellant in the impugned judgment **except** in respect to any offence under the ATA for which the appellant is acquitted for the reasons already discussed above.

14. The main issue is therefore one of sentencing which is at the discretion of the court keeping in view the period of punishment proscribed by the law and weighing up any mitigating and aggravating circumstances as sentencing is not a mechanical process and instead the court is to apply its judicial mind as was held in the case of **Muhammed Juman V State** (2018 SCMR 318).

15. In terms of aggravating circumstances no doubt this was a brutal crime committed in court premises but we find that the mitigating circumstances out weigh the aggravating circumstances based on the particular facts and circumstance of the case.

16. It is settled by now that if two or more accused fire on a person and cause his death, as in this case, and it cannot be proven with certainty which one of the accused caused the fatal shot, as in this case as per medical evidence, that generally this is a mitigating circumstance which justifies the reduction in sentence from death to life. In this respect reliance is placed on the cases of **Ghaffar Mahesar V State** (2022 SCMR 1280), **Allah Bux and others v. The State** (2018 SCMR 354) and **Atta-ur-Rehman and another v. The State** (2018 SCMR 372). We are also not satisfied that the motive has been fully proved as although the acquitted co-accused Mst. Noor Jehan according to the eye witnesses stated that she instigated the appellant and the absconding co-accused on account of the deceased marrying her daughter without her

348

consent this has been denied by her daughter Ms Najma in her evidence as DW who stated that she never married the deceased which casts some doubt on whether the motive was proven. It is well settled by now that the failure to prove an asserted motive is generally regarded as a mitigating circumstance to justify the reduction of the death sentence to one of life imprisonment. In this respect reliance is placed on the cases of **Mst.Nazi Anwar V State** (2018 SCMR 911) and **Amjad Shah V State** (PLD SC 2017 P.152). Furthermore, as stated by the eye witness PW's the appellant and the absconding co-accused **were instigated** by the appellant's wife to murder the deceased and the Supreme Court has held that instigation by a very close relative/parent can be a mitigating circumstance in reducing the death sentence to Life Imprisonment. In this respect reliance is placed on the case of **Nazeer Ahmed** (Supra). **Significantly** although the trial court had found that the wife of the appellant had instigated the appellant to commit the murder of the deceased the trial court acquitted her, for which no appeal against her acquittal was filed, and as such although she did not actually carry out the murder without her instigation the appellant and the absconding co-accused may not even have committed the murder so the treatment given by the trial court to the acquitted co-accused who instigated the actual murder i.e acquittal to a certain extent justifies a reduction in the sentence of death to that of life imprisonment to the appellant. The fact that the appellant is seriously unwell requiring life saving treatment and is of a relatively advanced age although not a mitigating circumstance in and of itself also gives some weight to a reduction in sentence. That by pleading guilty and accepting his guilt the appellant has not only saved the time of the court but has also shown genuine remorse for his actions. Thus, when we take the mitigating and other circumstances mentioned above as a whole into account and read them in a holistic manner we find that they out weigh the aggravating factors and taking guidance from the case of **Ghulam Mohy-Ud-Din** (Supra) where it was held that if the case so justifies it is better to preserve life and impose the alternate sentence we hereby reduce the sentence of the appellant from the death penalty to Life imprisonment in respect of the murder of the deceased.

17. **In summary.**

- (a) The appellant is acquitted of any offence under the ATA in the impugned judgment
- (b) The appellant is convicted for all other offences under the PPC and Sindh Arms Act in the impugned Judgment and his sentence is maintained in respect of all such offences **except** that his death sentence under section 302 PPC for murder is reduced to one of life imprisonment with all other fines and compensation remaining in place with the confirmation reference being answered in the negative
- (c) All the sentences shall run concurrently, the benefit of S.382 (B) Cr.PC shall be given to the appellant who shall also be entitled to all remissions applicable to him under the law now that he was been acquitted of any offence under the ATA..

18. The appeal is dismissed **except** as modified above with the confirmation reference being answered in the negative.