

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.463 of 2022
Confirmation Case No.06 of 2022

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio

Appellants : Bannal Khan S/o Muhammad Sharif & Zafar Abbas S/o Noor Muhammad
through Khawaja Muhammad Azeem, Advocate for Appellant Bannal Khan a/w Mr. Muteullah Gondal, Advocate & Mr. Ali Wahid Kunwar, Advocate for Appellant Zafar Abbas
Respondent : The State
through Mr. Muhammad Iqbal Awan, Additional Prosecutor General Sindh.
Date of Hearing : 26.04.2023
Date of Order : 26.04.2023

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- Appellants Bannal Khan and Zafar Abbas were tried before the Court of Addl. District & Sessions Judge-I/MCTC Karachi West in Session Case No.716/2021 under FIR No.543/2016 U/s 302/324/34 PPC at PS Gulshan-e-Iqbal, Karachi and vide judgment dated 30.05.2022, the appellants in Point No.4 were convicted and sentenced as under:

Point No.04

31. On the basis of discussion made hereinabove, I am of the humble estimation that the prosecution has successfully proved that from the firing of accused PC Bannal, Atiqullah died and Azizullah sustained firearm injuries. Both the accused persons were patrolling on same motorcycle they acted in furtherance of common intention and after the incident they tried to manage the facts so as to make it appear that police encounter had taken place thus common intention of accused is proved. Therefore, both accused persons convicted under Section 302/34 PPC.

Accused Bannal is sentenced to death. He shall be hanged till death while accused Zafar is sentenced to life imprisonment for committing Qatl-And of Atiqullah. In addition to that the accused is directed to pay compensation to tune of Rs.10,00,000/- each (Rupees Ten Lacs only each) to the legal heirs of the deceased as required under Section 544-A Cr.P.C. In case of failure of payment of compensation, the accused shall further undergo simple imprisonment for six months. The accused persons are also guilty of offence punishable under Section 324/34 PPC for attempt to murder to Azizullah therefore they are convicted under Section 324 PPC for the period they have already undergone in prison. In addition to that the accused is directed to pay fine to tune of Rs.50,000/- each (rupees fifty thousand only each). In case of failure of payment of fine, the accused shall further undergo simple imprisonment for six months. Accused are produced in judicial custody and they are remanded to prison to serve out the sentence according to law. The accused are informed that they may file appeal against death and life imprisonment sentence within seven working days. Copy of the judgment is supplied to them free of cost. Office is directed to prepare reference under Section 374 Cr.P.C. to Honourable High Court for confirmation of death sentence of accused Bannal forthwith.

2. The brief facts of the prosecution case as narrated by Complainant Syed Imdadullah Shah are that on 07.10.2016 present incident took place. His cousin namely Atiqullah and Azizullah are residing with him. Syed Atiqullah was studying in 2nd year in Rangers College and Azizullah had gone to admission in Karachi University. On 07.10.2016 they both were on motorcycle bearing No.KBW-5163 left the house for the coaching center Anglophile, it was 1800 hours. It was 2000 hours when he received the phone call of Azizullah from Jinnah Hospital that immediately reached at Jinnah Hospital for the reason that he and Atiqullah became injured by the firing of police. The complainant then accompanied with his father Ameer Muhammad reached at Jinnah Hospital where Azizullah disclosed him that he alongwith Atiqullah were going towards coaching center when reached under the NIPA bridge police stopped them and made fire upon them and they became injured. The fire was hit to Atiqullah on the right shoulder and it went through and through to Azizullah. Azizullah further disclosed that Atiqullah succumbed to injuries. Azizullah further disclosed that Bannal Khan made fire upon the Atiqullah and Zafar Abbas was with him. Then they shifted the injured to Liaquat National Hospital.

When the above news reached in the locality where they were residing the public came out from their houses and they felt insecure meanwhile media team arrived there. The public made the protest against the police and entire area was shutter down. They took the dead body of Atiqullah to Quetta and Azizullah was under medical treatment at Liaquat National Hospital. On 09.10.2016 he returned back to Karachi and approached the PS where his statement under Section 154 Cr.P.C. was recorded by Abdul Hameed Bullo. Hence, the instant FIR.

3. After usual investigation, the case was challaned and the accused persons were sent up for trial where they pleaded not guilty to the charge.

4. The prosecution in order to prove its case examined 11 Prosecution Witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which they denied the allegations levelled against them and claimed false implication. However, the accused did not give evidence on oath nor produce any DWs in support of their defence.

5. After hearing the parties and appreciating the evidence on record, the trial court convicted the appellants and sentenced them as set out earlier in this judgment; hence, the appellants have filed this appeal against their conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 30.05.2022 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Mr. Raj Ali Wahid Kunwar, Advocate undertakes to file Vakalatnama on behalf of appellant Zafar Abbas. He is directed to file the same in office. At the very outset of hearing of this appeal, learned counsel for the appellants stated that it was a case of remand in respect of appellants on the basis of two PWs; namely PW-6 Nazar Hussain and PW-7 Rao Fayaz, whose evidence was recorded in absence of the defence counsel and this was a violation of mandatory provision of Section 353 Cr.P.C. which was not curable under Section 537 Cr.P.C. In support of their contentions, they have placed reliance on the cases SBLR 2019 Sindh 967 [*Rajab Ali vs. The State*] and SBLR 2021 Sindh 112 [*Bashir Ahmed vs.*]

The State] and contended that under these circumstances, this case was of remand.

8. Learned Addl. AP.G. after considering the record was in agreement with learned counsel for the appellants.

9. We have also considered the record and gone through the relevant law and agreed with the learned counsel for the appellants and learned Addl. P.G. for the reasons mentioned above. This case warrants remand for trial Court.

10. Under these circumstances, we hereby set aside the impugned judgment dated 30.05.2022 and answer the Confirmation Reference in negative for the appellant Bannal Khan. The case shall be referred back to Addl. District & Sessions Judge-I/MCTC Karachi West for the limited purpose of re-recording the entire evidence of PW-6 Nazar Hussain and PW-7 Rao Fayaz in the presence of defence counsel, who shall also be given an opportunity to cross-examine the witnesses, who shall be re-examined if so desired by learned Public Prosecutor. Any outstanding applications on record shall be decided after hearing the parties in accordance with law. Thereafter, fresh statements under Section 342 Cr.P.C. of the appellants shall be recorded and after hearing the parties, learned trial Court shall re-write a fresh judgment based only on the evidence on record. This process shall be completed within a period of three months of the date of this judgment. A copy of this judgment alongwith R&Ps shall be immediately sent to Addl. District & Sessions Judge-I/MCTC Karachi West which shall comply with this judgment.

11. The instant appeal stands disposed of in the above terms and the Confirmation Reference is answered in negative.