

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

Criminal Jail Appeal No.D- 108 of 2014
[Confirmation Case No.25/2014]

PRESENT:

Mr. Justice Naimatullah Phulpoto
Justice Mrs. Rashida Asad

Date of Hearing : 27.08.2020
Date of Judgment : 08.09.2020

Appellant: Abdul Jabbar son of Muhammad by caste Dal
through Syed Tarique Ahmed Shah, Advocate.

The State: through Mr. Shahzado Saleem Nahiyoon, D.P.G.

J U D G M E N T

NAIMATULLAH PHULPOTO, J:- Appellant Abdul Jabbar was tried by Mr. Ghulam Rasool Samoon, Sessions Judge, Badin for offences u/s 302, 324 PPC. Who found the appellant guilty for offence u/s 302(b) PPC and 324 PPC and vide judgment dated 06th November, 2014 convicted him u/s 302(b) PPC as Tazir and sentenced to death for committing the murder of his sister Humera. Appellant was directed to pay the compensation of Rs.2,00,000/- to the legal of deceased in terms of Section 544-A Cr.P.C. Appellant was also convicted u/s 324 PPC for attempting to commit the murder of P.W Tayab and sentenced to 07 years R.I and to pay Rs.100,000/- (Rupees one lac) as fine. He was also convicted for the offence u/s 337-F(iii) PPC to suffer RI for one year as Tazir ant to pay Rs.100,000/- as Daman. Sentence of death awarded to the appellant was subject to the confirmation by this court as required u/s 374 Cr.P.C. By this appeal, the appellant has challenged his conviction and sentence.

2. The, facts of the case which have occasioned this appeal lie within a narrow orbit and may be briefly indicated that complainant Photo Dal lodged FIR at P.S Kario Ghanwar on 30.11.2011 at 1715 hours, stating therein that he was working as labourer at the Mill of Tayab Gopang. They are in all five brothers and have four sisters. Out of them, three are married while Ms Humera aged about 19/20 years (now deceased) was un-married, who resided with them. P.W Tayab Gopang had demanded hand of sister Ms Humera from complainant but they had refused. It is alleged that complainant party had family terms with Tayab Gopang and he used to visit their house. Appellant suspected that complainant will give the hand of Ms Humera to Tayab as such Abdul Jabbar restrained brothers not to work at the Mill of Tayab and disconnect friendly relations with Tayab. On the day of incident, complainant went to the Mill of Tayab while his brothers Ashraf, Malook, Jabbar and his sister Humera were present in the house. It is alleged that at about 4-30 P.M, complainant alongwith Tayab reached at the house, they saw that Jabbar was carrying gun in his hand and in presence of brothers fired straight at his sister Ms Humera, who fell down on sustaining firearm injuries. Accused Jabbar started running towards Southern side. Complainant party tried to apprehend him, on which appellant Jabbar fired at P.W Tayab with intention to kill him, who on receiving the gun shot injury fell down and accused Jabbar ran away. P.Ws saw that Ms Humera had sustained firearm injury on right side of her chest and expired at spot. P.W Tayab had received injury on right side shoulder. Injured Tayab was taken to hospital at Golarchi for treatment. Thereafter, complainant leaving his brothers Ashraf and Malook over the dead body of Ms Humera, went to the police station and lodged FIR. It was recorded on 30.11.2011 at 1715 hours vide Crime No.112 of 2011 u/s 302, 324 PPC at P.S Kario Ghanwar.

3. ASI Muhmmad Ali took up the investigation and after completing it submitted charge-sheet against the accused u/s 302, 324 PPC.
4. Charge was framed against the appellant to which he pleaded not guilty and claimed to be tried.
5. At the trial prosecution examined W.M.O. Dr Hajiran (P.W.1), Dr. Muhammad Siddique (P.W.2), Complainant Photo (P.W.3), Ashraf (P.W.4), ASI Nazim Hussain (P.W.5), Malook (P.W.6), Anwar (P.W.7), Muhammad Uris (P.W.8), I.O/ASI Muhammad Ali Zaoor (P.W.9) and Tapedar Dodo Khan (P.W.10). Thereafter, prosecution side was closed.
6. Trial court recorded the statement of accused u/s 342 Cr.P.C in which he claimed false implication in this case, over the dispute of employment with P.W Tayab. Appellant did not lead any evidence in defence and declined to give statement on Oath in disproof of the prosecution allegations.
7. Learned trial court after hearing the learned counsel for the parties, assessment of the evidence available on record, found the appellant guilty and convicted him and sentenced to death accordingly and made Reference to this court for confirmation of the death sentence. It is in these circumstances, the present appeal has been filed.
8. We have heard Syed Tarique Ahmed Shah, learned counsel for the appellant and Mr. Shahzado Saleem Nahiyoon, learned D.P.G. for State. Notice was issued to the complainant and it was served upon him but he did not appear.
9. Learned D.P.G. has supported the conviction of the appellant but has stated that real cause of occurrence remained shrouded in mystery and was completely suppressed by both the parties to the case. Sentence of death awarded to the appellant may be reduced to life imprisonment.

10. The fact that deceased Humera aged about 20 years died after sustaining firearm injuries is proved from the evidence of W.M.O Hajiran (P.W.7). Injury on the person of Tayab by means of firearm at right side of chest is also proved from the evidence of Dr. Muhammad Siddique (P.W.2). Eye witnesses have also deposed that deceased Humera and injured Tayab received the firearm injuries at the hands of appellant, which we will discuss at proper time. W.M.O. Hajiran (P.W.1) had conducted the autopsy on the dead body of Miss Humera on 30.11.2012 and found following two injuries on her person:-

1. Lacerated wound measuring 3.5 cm x 2.5 cm x deep x chest cavity with inverted margins surrounded by the pellet wounds with the sign of profuse bleedings over the right upper part of the chest.
2. Lacerated wound, measuring 16.2 cm x 5.2 cm x deep x right thoracic cavity with everted margins lateral to the injury No.1 with sign of profusing bleeding.

11. Dr. Muhammad Siddique on examination of injured Tayab on 30.11.2012, found the following injury on his person:-

1. Multiple small lacerated wounds measuring 0.4 cm x 0.3 cm with blackish margins at anterior aspect of right shoulder and upper part of anterior aspect of right side of the chest. Bleedings from wounds muscle deep.

12. The fact of un-natural death of deceased Humera by means of firearm is not even denied by learned advocate for the appellant who has, however, pleaded that ocular evidence is contradictory to the medical evidence with regard to the distance from which fire was made upon the deceased. Injury received by P.W Tayab by means of firearm is also undisputed. From the evidence of doctors / experts, we are satisfied that Ms Humera died her un-natural death by means of firearm injuries and P.W. Tayab had also received firearm injury as described by the Medical Officers. Finding of trial court on this point requires no interference.

13. There is ocular evidence against the appellant evidence of eye witnesses namely complainant Photo (P.W.3), Ashraf (P.W.4) and Malook (P.W.6). ASI Muhammad Ali (P.W.9) received FIR bearing Crime No.112/2011 from ASI Nazim for investigation of the case. I.O. inspected the place of wardat situated in house where dead body of Humera was lying. He prepared inquest report in presence of the mashirs at 1800 hours and secured two empty cartridges of 12-bore from the house of complainant in presence of the mashirs and sealed at spot. He also secured blood stained earth and sealed in presence of the same mashirs then referred dead body to the hospital for postmortem examination and report. I.O recorded 161 Cr.P.C statements of P.Ws Malook and Ashraf. He wrote letter to the concerned Mukhtiarkar for preparation of sketch of the place of wardat. On 01.12.2011, he recorded the statement of injured Tayab who was admitted in Civil Hospital, Hyderabad and noted down his injuries in presence of the mashirs. On 02.12.2011, through P.C Urs he sent clothes of the deceased, bangles which he had secured and blood stained earth and clothes of the deceased to the chemical examiner for analysis and report. On 07.12.2011, he arrested the accused Abdul Jabbar at Jhona stop in presence of the mashirs and prepared such mashirnama. On 10.12.2011, during interrogation accused prepared to produce the crime weapon used by him in the commission of offence. Thereafter, on the pointation of accused DBBL gun and two live cartridges were recovered from Jungle in presence of the mashirs. Appellant had no license for the gun used by him in commission of offence. Hence, a separate FIR u/s 13(e) Arms Ordinance, 1965 was registered against him. Gun and empty cartridges were sent to the Ballistic Expert for examination. Positive report was received and it was produced in evidence before trial Court.

14. Bearing in mind the above material, let us now examine the evidence of eye witnesses. Complainant Photo (P.W.3) has deposed that on 06.05.2014 present incident had occurred about 2 ½ years back. He alongwith his brother Ashraf used to work as labourer in the Floor Mill of Tayab Gopng. Tayab Gopang had demanded the hand of sister of the complainant namely Humera for marriage but the complainant party had refused. Appellant Abdul Jabbar was annoyed with the proposal of Tayab for marriage with Humera. On the day of incident, complainant, P.Ws Ashraf, Malook and appellant Abdul Jabbar were present in the house alongwith sister Humera. At about 4/4-30 p.m. appellant Abdul Jabbar took gun in his hand and fired upon sister Humera who fell down. Thereafter, he fired upon Tayab who also fell down. Then accused ran away. Miss Humera had died at the spot and Tayab was shifted to the hospital in injured condition. Complainant went to the police station and lodged the FIR. He was cross examined at length and denied suggestion that he had committed the murder of his sister and was deposing falsely against the appellant. Ashraf (P.W.4) has also deposed that P.W Tayab had demanded the hand of Humera on which appellant was annoyed. On the day of incident P.W Tayab came to the house of appellant where he fired upon Humera as well as upon Tayab. Humera died at the spot and Tayab was shifted to the hospital in injured condition. This P.W was also cross examined at length and denied the suggestion that he was deposing falsely against his brother. Malook (P.W.6) has deposed that prior to this incident Tayab had demanded the hand of sister Humera on which his brother accused Jabbar got annoyed. On the day of incident when Tayab alongwith complainant came to the house of the complainant on motorcycle appellant fired upon him so also upon his sister. Miss Humera died at spot and Tayab was shifted to the hospital. He has also denied the suggestion that appellant has been falsely implicated in this case.

15. Admittedly, above eye witnesses are brothers of the appellant as well as of deceased as such interested, but this fact alone is not sufficient to brush aside their confidence inspiring evidence. Eye witnesses had no enmity with the appellant brother.

MOTIVE:- The complainant Photo (P.W.3) has deposed that P.W Tayab had demanded the hand of his sister about one year prior to this incident. Present incident occurred on 30.11.2011 at 1630 hours in the house of the complainant. In order to appreciate the prosecution evidence properly, examination-in-chief of the complainant is reproduced hereunder:-

“This incident took place about two and half years back. I and my brother Ashraf used to work as labourer on the floor mill of Tayab Gopang. Thereafter, Tayab demanded hand of our sister Mst. Ameeran for marriage, but we refused. Accused Jabbar is also our brother who told us to leave the work of labourer with Tayab. On the day of incident, when we finished our work Tayab brought me on his motorcycle to leave me at my home. Ashraf, Malook, Jabbar and my sister Humera were present in the house. It was about 4 or 4-30 P.M. When we reached at our home, accused Jabbar took gun and fired upon our sister Humera who fell down. Thereafter, we tried to capture Jabbar but he again came towards Tayab and fired upon him. Tayab also fell down. Accused then ran away. We saw that our sister had died on the spot. Tayab was injured. Tayab was shifted to hospital by his brother who came on information. I went to P.S Kario where I lodged the FIR. Police then accompanied me to the place of incident where they saw the dead body and secured two empties of cartridges. Police inspected dead body and prepared papers. Thereafter, we and police took dead body to Golarchi hospital where postmortem was conducted and after that dead body was handed over to us. I produce FIR at Ex.8-A, it is same correct and bears my LTI. I produce receipt at Exh.8-B. Accused present in court is same.”

16. Other eye witnesses regarding actual occurrence have narrated more or less the same story, regarding motive deposed that about one year back P.W Tayyab had proposed / demanded the hand of sister of appellant on which appellant became angry. We have noticed that the occurrence in this case had taken place in broad day light and inside the house of complainant Photo and an FIR in respect of the alleged occurrence was lodged at Police

Station Kario Ghanwar District Badin on 30.11.2011 at 1715 hours u/s 302, 324 PPC wherein the present appellant who was the brother of complainant was named as sole perpetrator of the murder of Humera and attempted to commit murder of P.W Tayab. Complainant Photo (P.W.3) and other witnesses namely Ashraf and Malook being inmates of the house where occurrence had taken place and the time of occurrence was such that eye witnesses were likely to be present in the house at that time. Complainant and other two witnesses who are the real brothers of the appellant had absolutely no reason to falsely implicate the appellant in the murder of his sister. Crime weapon was also produced by the appellant. Medical evidence had provided full support to the ocular account furnished by three eye witnesses. Learned trial court had undertaken an exhaustive analysis and the evidence available on record and then came to the conclusion regarding guilt of the appellant having been established to hilt upon. Upon our independent evaluation of the evidence, we have not been able to take different view from that taken by the trial court. Contention of the defence counsel that ocular evidence is contradictory to the medical evidence has been examined by us at length but we found it without any legal substance. There can conceivably be many theories as to why P.W Tayab was found inside the house of the complainant when Tayab had demanded the hand of sister of complainant one year back and it was refused and appellant was annoyed with Tayab. Prosecution has no reply as to why P.W Tayyab, went to house of appellant, when he was annoyed with him. Prosecution has also failed to satisfy us as to why appellant killed his young sister. Real cause of occurrence in the house of the complainant shrouded in mystery and was completely suppressed by both the parties to the case. Unfortunately, Investigation Officer had also failed to interrogate / investigate about the motive for commission of the offence where the prosecution asserted a motive but failed to prove the same then failure on the part of prosecution may re-act against the sentence of death passed

against the convict on the charge of murder as held by Honourable Supreme Court of Pakistan in the judgment of Mst. Nazia Anwar v. The State and others (2018 SCMR 911). A reference in this respect may be made to the cases of Ahmad Nawaz v. The State (2011 SCMR 593), Iftikhar Mehmood and another v. Qaiser Iftikhar and others (2011 SCMR 1165), Muhammad Mumtaz v. The State and another (2012 SCMR 267), Muhammad Imran alias Asif v. The State (2013 SCMR 782), Sabir Hussain alias Sabri v. The State (2013 SCMR 1554), Zeeshan Afzal alias Shani and another v. The State and another (2013 SCMR 1602), Naveed alias Needu and others v. The State and others (2014 SCMR 1464), Muhammad Nadeem Waqas and another v. The State (2014 SCMR 1658), Muhammad Asif v. Muhammad Akhtar and others (2016 SCMR 2035) and Qaddan and others v. The State (2017 SCMR 148).

17. The Hon'ble Supreme Court of Pakistan has diluted upon this question in the case of **Ghulam Mohy-ud-Din alias Haji Babu and others v. The State** (2014 SCMR 1034), as under:-

"If the intent of legislature was to take away the discretion of the court, then it would have omitted from S.302(b), P.P.C. the alternative sentence of life imprisonment".

In the same judgment, the Hon'ble Supreme Court further held that:-

"Sentence of death and life imprisonment were alternative to one another, however, awarding one or the other sentence essentially depended upon the facts and circumstances of each case".

The Hon'ble Supreme Court of Pakistan has consistently held that the imprisonment for life is also a legal sentence in the case of section 302(b), P.P.C. Reference, in this regard, can be placed to the cases of **Muhammad Riaz and another v. The State and another** (2007 SCMR 1413) and **Muhammad Sharif v. The State** (PLD 2009 Supreme Court 709).

18. In the present case, learned advocate for the appellant had argued that the prosecution has failed to examine P.W Tayab but record reflects that P.W Tayab died his natural death before his evidence. Complainant in his FIR has stated that the appellant was in his early youth aged about 18/19 years at the time of incident. Prosecution has failed to explain as to why the appellant committed murder of his sister when he had motive against P.W Tayab. Learned advocate for the appellant had lastly, argued that in case the court is not convinced for recording acquittal in favour of the appellant then his death sentence may be converted into life. Learned D.P.G. had also argued that motive was shrouded in mystery and prayed for reducing the sentence from death to life. We have come to conclusion that the real cause of occurrence was something different which had been completely suppressed by both the parties to the case and that real cause of occurrence remained shrouded in mystery. Such circumstances of this case have put us to caution in the matter of appellant`s sentence. As such, maintaining death sentence would be unwarranted in this particular case and life imprisonment would be the appropriate sentence. Reliance, in this regard, can be placed upon above cited authorities.

19. In the view of above, Criminal Jail Appeal No.D-108 of 2014 is dismissed to the extent to appellant`s conviction for offence u/s 302(b) PPC but the same is partly allowed to the extent of death sentence which is reduced to imprisonment for life. Appellant is ordered to pay compensation of Rs.2,00,000/- to the legal heirs of deceased as directed by the trial court. In case of default thereof, appellant is directed to suffer SI for six months more while other sentences awarded to the appellant by the trial court are maintained. The benefit of Section 382-B Cr.P.C shall be extended to the appellant. Confirmation Reference No.D-25 of 2014 made by the trial court for

confirmation of the death sentence is answered in **NEGATIVE** and death sentence is **NOT CONFIRMED**.

JUDGE

JUDGE

Tufail