

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

Cr. Jail Appeal No.D-32 of 2017
Confirmation Case No.17 of 2017

Present:

*MR. JUSTICE NAIMATULLAH PHULPOTO
JUSTICE MRs. RASHIDA ASAD*

Date of hearing: 26.08.2020

Date of decision: 22.09.2020

Appellants: Ghazi Khan and Zakir Ali through Mr. Wazir Hussain Khoso, advocate

Complainant: Hadi Bux through Mr. Shaikh Nabi Bux Azad, advocate.

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

J U D G M E N T

Rashida Asad, J.-Ghazi Khan and Zakir Ali, appellants have impugned judgment dated 29.03.2017, passed by learned Additional Sessions Judge, Tharparkar @ Mithi in Sessions Case No.84 of 2011 arising out of Crime No. 88 of 2011 for offences under sections 302, 147, 148, 149, 114, 504 P.P.C., registered at PS Nagarparkar, whereby both the appellants were convicted under section 302(b) P.P.C., and sentenced to death subject to the confirmation by this Court. They were also directed to pay compensation as provided under section 544-A Cr.P.C., of Rs.200,000/- (Rupees Two Lacs) each to the legal heirs of deceased, in case of default thereof, to suffer S.I. for six months more. Benefit of section 382-B, Cr.P.C. was also extended to them. However, co-accused Noor Ali, Atta Muhammad and Attar Khan were acquitted by the learned trial Court while extending them benefit of doubt.

2. The facts of the case in brief, as stated by the complainant Hadi Bux, are that he resides at his own agricultural land and there was a dispute over piece of land between him and accused Atta Muhammad and others. On 28.10.2011, he along with Hismat Ali and Mevo Khan

were working in the land, whereas, his son Gul Nawaz was grazing the cattle towards the land of Raham Ali Khan. At about 4:30 p.m., on hearing cries of his son Gul Nawaz they all rushed towards the said place where he saw accused Ghazi Khan, Zakir Ali, Atta Muhammad, Noor Ali and Attar, all sons of Gulab Khan Khosa, duly armed with hatchets. Accused Ghazi Khan inflicted hatchet blow on the right ear of his son; accused Zakir Ali also inflicted hatchet blow over the head of his son whereas, on instigation of accused Atta Muhammad other accused also inflicted hatchet blows on different parts of his son and thereafter they all ran away. His son succumbed to his injuries on the spot. complainant while leaving P.W son spot, reported the incident at Police Post Harho, which later incorporated into the FIR.

3. After usual investigation, challan was submitted against the accused before the concerned competent Court of law. Trial Court framed the charge against them at Ex.5, to which they pleaded not guilty and claimed to be tried.

4. At the trial, prosecution examined as many as seven prosecution witnesses and thereafter, prosecution closed its side vide statement at Ex.19.

5. Statements of the accused u/s 342 Cr.P.C. were recorded, in which they denied the allegations of prosecution and professed their innocence and pleaded their false implication due to dispute over agricultural land. Accused Ghazi Khan also produced copy of Form-VII, however, accused did not examine themselves on oath as provided under section 340(2), Cr.P.C., but they examined D.Ws Raham Ali Khan and Dad Khan in their defence.

6. At the conclusion of the trial, the learned trial judge convicted the two accused/appellants and sentenced them as aforesaid. However, by extending benefit of doubt acquitted the co accused. A reference was also made to this court for confirmation of death sentences. Hence, this appeal is preferred against the impugned judgment. By this single judgment, we intend to decide above criminal appeal as well as confirmation reference made by the trial Court being bound by a common thread.

7. Learned counsel for the appellants argued that both the appellants were falsely implicated by the complainant due to dispute over an agricultural land; that co-accused Noor Ali, Atta Muhammad and Attar Khan have been acquitted by the learned trial Court on the same set of evidence and the learned trial Court, convicted and sentenced both the appellants without giving any tangible and cogent reasons; that the motive as alleged by the complainant has not been established at trial.

8. Conversely, learned Deputy Prosecutor General duly assisted by learned counsel for the complainant has argued that the prosecution has proved its' case against appellants beyond any reasonable doubt; that it was day time incident and no question of mistaken identity arise; that the ocular evidence is fully corroborated by the medical evidence; that the parties are closely related; that co-accused were rightly acquitted by the learned trial Court as the allegation against them was generalized in nature whereas, the case of present applicants is distinguishable from the case of the co-accused as the injuries attributed to both the appellants are reflected from the postmortem report. However, learned D.P.G frankly conceded that motive as alleged in the case could not be established at trial.

9. We have heard the learned defence counsel, learned Deputy Prosecutor General for the State and learned counsel for the complainant and have minutely gone through the material available on record with their able assistance.

10. The prosecution in order to prove the unnatural death of deceased Gul Nawaz, examined Dr. Orangzeb, CMO Taluka Hospital Nagarparkar, who deposed that on 29.10.2011 at 2:00 a.m., he received the dead body of deceased Gul Nawaz through PC Muhammad Soomar of PS Nagarparkar. On external examination, he found the following injuries:

Injury No.1. Incised wound on right temporo parietal region oblique in direction clear cut margins, measuring 12 x 2 cm x bone cut, red scab formation seen around wound bone fracture measuring 8 x 1 cm. reddish in colour.

Incised wound on right frontal region, oblique in direction clear cut margins, measuring 8 x 2 cm x bone cut, red scab formation

around wound seen bone fracture measuring 6 x 0.6 cm. reddish in colour.

Injury No.2. Incised wound on right temporo parietal region oblique in direction clear cut margins, measuring 12 x 2 cm x bone cut, scab formation seen around wound bone fracture measuring 8 x 1 cm. reddish in colour.

Injury No.3. Incised wound on left cheek, oblique direction injury extending from maxillary prominence to lower lip destroying whole maxillary prominence measuring 10 x 3 cm x bone cut, red scab formation around wound seen red in colour.

Injury No.4. Incised wound on right cheek fertile in direction measuring 5 x 0.5 cm x deep to bone visible clear cut margins, red scab formation seen around wound reddish in colour.

Injury No.5. Incised wound on right chest anteriorly above nipple measuring 8 x 1 cm clear cut margins, oblique direction red scab formation around wound red in colour.

Injury No.6. Incised wound on right upper arm lower 1/3rd posterior aspect oblique direction measuring 7 x 3 cm and bone fracture, red scab formation seen.

Injury No.7. Incised wound on left lower/fore arm ulna aspect measuring 5 x 1 cm deep to bone fracture oblique direction, red scab around wound red in colour.

All above injuries caused by sharp cutting weapons. All above injuries were ante mortem.

From external as well as internal postmortem examination of dead body of deceased, he was of the opinion that the cause of death was massive hemorrhage which was caused by injuries No. 1 to 7. Predominantly, injuries No. 1, 2 and 3 caused death. All injuries were homicidal.

11. From the medical evidence as furnished by the Medical officer, it is clear that deceased Gul Nawaz died his unnatural death. No question was raised regarding the efficiency and integrity of the Medical officer, therefore, we are of the view that the deceased died his unnatural death as described by the Medical Officer.

12. The ocular account was furnished by complainant Hadi Bux, P.Ws Hashmat and Mevo Khan. Complainant Hadi Bux deposed that he lived in a hut constructed on his own land and cultivates the same land, that he had a dispute over a piece of land with accused Atta Muhammad and others. On 28.10.2011, he along with his son Hismat Ali and

co villager Mevo Khan were working on the land whereas, his son Gul Nawaz was grazing the cattle towards the land of Raham Ali Khan. At about 4:30 p.m., he heard cries of his son Gul Nawaz, to which he along with Hishmat Ali and Mevo Khan rushed towards the said place and saw accused Ghazi Khan, Zakir Ali, Atta Muhammad, Noor Ali and Attur all sons of Gulab Khan Khosa duly armed with hatchets and saw the accused Ghazi Khan inflicting hatchet blow on the right ear of his son; accused Zakir Ali also caused hatchet blow over the head of his son. He further deposed that on the instigation of accused Atta Muhammad other accused also inflicted hatchet blows on different parts of his son and thereafter ran away. Complainant's son succumbed to his injuries and died on the spot, thereafter, complainant while leaving P.Ws near the dead body went to Police Post Harho and reported the incident. Thereafter, police came and examined the dead body in their presence and prepared such memo. The dead body was brought to Taluka Hospital Nagarparkar and after conducting postmortem, the same was handed over to them. After funeral ceremony, the complainant went to P.S Nagarparkar where his earlier report was incorporated into FIR.

13. P.W Hashmat Ali deposed that on 28.10.2011 he along with his father/complainant and Mevo Khan was working on the land while his brother Gul Nawaz was grazing cattle towards the land of Raham Ali Khan at about 4:30 p.m, on hearing cries of Gul Nawaz they rushed towards the place of occurrence and saw accused Ghazi Khan, Zakir Ali, Atta Muhammad, Noor Ali and Attur Khan all son s of Gulab Khan duly armed with hatchets. Out of them, accused Ghazi Khan inflicted hatchet blow on the right ear of his brother; accused Zakir Ali also inflicted hatchet blow over the head of his brother. He further deposed that on the instigation of accused Atta Muhammad other accused also inflicted hatchet blows on different parts of his brother and thereafter went away. They saw Gul Nawaz, who succumbed to his injuries and died on the spot, thereafter, complainant while leaving him and P.W Mevo Khan near the dead body went to Police Post Harho and reported the incident. Thereafter, police came at the spot and examined the dead body in their presence and prepared such memo. The dead body was brought to Taluka Hospital Nagarparkar where after its' postmortem, the same was handed over to them and after conducting funeral

ceremony, the complainant went to P.S. Nagarparkar and lodged the FIR. During lengthy cross examination the ocular account furnished by the above prosecution witnesses has not been shaken in respect of the occurrence, taken place in broad day light, wherein the present appellants were nominated as perpetrators of the alleged murder with hatchet blows, given by the appellants, causing death of deceased.

14. The ocular evidence has further been corroborated by the medical evidence produced by Medical Officer Dr. Orangzeb, who opined that the death occurred due to the injuries caused by sharp cutting weapons. Other PWs have also supported the case of prosecution and implicated the accused in the commission of offence. PWs were cross-examined at length but nothing favourable to the appellants came on record. The hatchets used in the commission of the crime were recovered by the police on the pointation of appellants. The bloodstained earth, clothes and hatchet were sent to the chemical examiner and according to the report of the Chemical Examiner the same were stained with human blood. In the instant case, the prosecution succeeded to prove its' case against the appellants beyond any shadow of doubt for the reasons that it was day light incident and reported with reasonable promptitude to a nearest police post. The appellants have been assigned specific roles of inflicting hatchet blows to the deceased. Both the parties are related to each other and nothing has been brought on record by the appellants at trial that the complainant had falsely implicated the appellants in the murder of his son. The trial Court has rightly held that the prosecution proved its' case against the appellants. The trial court had acquitted the co-accused mainly on the ground that the allegations against the acquitted accused were generalized in nature and such acquittal has not been challenged, which has attained finality.

15. As regards to the motive in the FIR, complainant Hadi Bux has alleged that there was dispute in between the complainant party and accused Atta Muhammad on the landed property. In evidence of complainant Hadi Bux has stated that he had dispute with Atta Muhammad son of Gulab Khan and others over the land. Evidence of PW-2 Hashmat Ali is silent with regard to motive but in the cross

examination he has replied that there was dispute of complainant party with accused over the land. ASI Hameer Chand (PW-5), who is the Investigation Officer of the case had also failed to interrogate / investigate the motive for the commission of offence. Complainant Hadi Bux and PW-2 Hashmat Ali had failed to disclose the survey numbers / particulars of the land in dispute between the parties. They have also failed to mention Deh in which disputed land is situated. Evidence of complainant and eye witness Hashmat Ali with regard to motive is generalized in nature. Complainant and PW Hashmat had deposed that they had dispute with Atta Muhammad over the land. Said Atta Muhammad has already been acquitted by the trial court.

We have come to the conclusion that motive as set up by the prosecution i.e. dispute over the land has not been established at trial. I.O. had also failed to interrogate / investigate with regard to motive hence we hold that motive was quite weak and unspecific. It is settled law that if the prosecution asserts a motive but fails to prove the same then such failure on the part of the prosecution may react against a sentence of death passed against a convict on the charge of murder. Reliance is placed upon the case reported as **Nawab Ali vs. The State (2019 SCMR 2009)**, wherein the Honourable Supreme Court has held as under:-

“3. Leave to appeal had been refused by this Court as far as the merits of the case against the appellant were concerned because the prosecution had indeed succeeded in proving its charge against the appellant beyond reasonable doubt. The question to be considered by us now is as to whether there are any mitigating circumstances available on the record warranting reduction of the sentences of death passed against the appellant to imprisonment for life or not. In this context we have observed that the motive set up by the prosecution was quite vague and unspecific and admittedly no independent evidence worth its name had been brought on the record in support of the asserted motive. It is settled law that if the prosecution asserts a motive but fails to prove the same then such failure on the part of the prosecution may react against a sentence of death passed against a convict on the charge of murder and 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). Apart from that the alleged recovery of a Kalashnikov from the appellant's custody during the investigation was legally inconsequential because, according to the record, the recovered Kalashnikov and the crime-empties secured from the place of occurrence had reached the Forensic Science Laboratory together. It has also intrigued us to notice that if there were some issues about some conduct of Mst. Riffat deceased then her father, husband or brothers had taken no action against her and it is not clear from the record as to why the present appellant had taken upon himself to do away with not only Mst. Riffat but her husband and children as well. This shows that something else was going on in the family which had led to the present occurrence but that something had been completely suppressed by the prosecution, although some indication in that regard had been made by the appellant in his statement recorded under section 342, Cr.P.C. For all these reasons we have decided to exercise caution in the matter of the appellant's sentences of death and have felt persuaded to reduce the said sentences of death to imprisonment for life on each count of the charge. This appeal is, therefore, dismissed and the convictions of the appellant on all the four counts of the charge under section 302(b), P.P.C. are maintained but this appeal is partly allowed to the extent of the appellant's sentences of death which are reduced to imprisonment for life on each of the four counts of the charge. We have found that the amount of compensation ordered by the trial court to be paid by the appellant to the heirs of each deceased is excessive and the same warrants reduction in the interests of justice. It is, therefore, ordered that the appellant shall pay a sum of Rs. 1,00,000/- (Rupees one hundred thousand only) to the heirs of each deceased by way of compensation under section 544-A, Cr.P.C. or in default of payment thereof to undergo simple imprisonment for six months on each of the four counts of the charge. All the sentences of imprisonment passed against the appellant shall run concurrently to each other and the benefit under section 382-B, Cr.P.C. shall be extended to him. This appeal is disposed of in these terms."

16. For all these reasons, we have decided to exercise caution in the matter of the appellants' sentence of death and have felt persuaded to reduce the said sentences of death to imprisonment for life. This appeal is, therefore, dismissed and the convictions of the appellants under section 302(b), P.P.C. are maintained but this appeal is partly allowed to the extent of the appellants' sentences of death which are reduced to imprisonment for life. As regards to compensation and sentence of imprisonment in case of failure to pay the compensation are concerned, the same are maintained. The benefit under section 382-B, Cr.P.C. is also extended to the appellants. Resultantly, Reference made by trial court for confirmation of death sentence is answered in negative and the appeal is disposed of in these terms.

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